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No. ____
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In the Supreme Court of the United States

October Term, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Office of Independent Counsel has issued a grand jury subpoena commanding the White House to produce notes of certain communications between attorneys in the Office of the President and the First Lady, Hillary Rodham Clinton, in the presence of the First Lady's personal counsel. The court of appeals, which enforced the subpoena by a divided vote, did not dispute that the notes (i) reflected confidential communications (ii) made for the purpose of providing legal advice (iii) to a client (the Office of the President) (iv) in connection with ongoing grand jury proceedings and contentious legislative hearings. The court held, however, that there simply is no governmental attorney-client privilege in the face of a federal grand jury subpoena. It also held that documents created by government lawyers in anticipation of grand jury and legislative proceedings are not prepared "in anticipation of litigation" for purposes of the work product doctrine.

The petition presents two questions:

1. Whether the court of appeals correctly held that the Office of the President does not possess an attorney-client privilege that may be asserted in response to a federal grand jury subpoena and must comply with the subpoena.

2. Whether work performed by attorneys for an entity of the federal government in anticipation of grand jury proceedings involving the entity and employees of the entity, or in preparation for legislative hearings investigating the operations of the entity, is protected under the attorney work product doctrine.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Hillary Rodham Clinton was a party in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Office of the President respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-61a) is not yet reported. The opinion of the district court (App. 62a-83a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 9, 1997. The petition for a writ of certiorari is accordingly due no later than July 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Rule 501 of the Federal Rules of Evidence is set forth at App. 96a.

STATEMENT

This case arises from a subpoena *duces tecum* issued to the White House by the Office of Independent Counsel Kenneth W. Starr ("IC"), calling for production of "*[a]ll* documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton" (emphasis added) regarding a wide range of subjects. App. 2a. Although the IC and the White House had successfully resolved many other disputes over requests for information, the IC chose, through this subpoena, to contest whether the federal government is entitled to the protections for its lawyers' activities enjoyed by all other organizations. Because the IC has determined not to recognize the confidentiality of *any* communications between attorneys for the federal government and any government officials, petitioner has sought judicial resolution of the matter.

Reversing the district court's decision, a divided court of appeals ordered the subpoena enforced. The majority recognized that the lower courts have applied a governmental attorney-client privilege in a wide array of settings, thereby "encouraging the full and frank presentation of legal advice" to government clients. App. 16a. Notwithstanding this well-settled body of law, the majority treated the present case as one of "first impression" (*id.* at 29a) because it arose in the context of a federal grand jury investigation. In that setting, the majority stated (*id.* at 17a), "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." The court of appeals also held that petitioner could not invoke the work product doctrine because the White House could not itself be indicted, and therefore the subpoenaed materials were not prepared "in anticipation of litigation."

A. Factual Background

1. In January 1994, Attorney General Janet Reno appointed Robert Fiske to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1. Mr. Fiske was replaced by Independent Counsel Kenneth W. Starr in August 1994, after the Independent Counsel statute was reauthorized.

Although the IC's investigation initially focused on events in Arkansas that antedated President Clinton's Administration, it has expanded to encompass a wide range of allegations regarding the conduct of White House officials during this Administration. In connection with these matters, scores of present and former White House employees have been interviewed by the IC or have given grand jury

testimony about their conduct during this Administration. The IC has issued more than 20 document subpoenas to the White House. Moreover, all of these matters also have been thoroughly investigated by congressional committees, which have treated them as affairs having serious import for the Office of the President. See Declaration of Jane C. Sherburne ¶¶ 6, 12 [hereafter "Sherburne Dec."] (App. 85a).

This swirl of inquiries has produced a host of legal issues for the Office of the President requiring the involvement and advice of White House attorneys. The task of these lawyers in rendering legal advice to the Office of the President has included, among other things, satisfying the Office's obligation to respond to document requests and subpoenas from Congress and the IC; considering whether to recommend that the President invoke executive or other privileges with regard to any of the information requested; advising on matters related to appearances by White House officials before congressional investigative committees, and negotiating the terms of such appearances; representing the Office of the President in connection with interviews and depositions by the IC of White House personnel, including attendance at depositions of the President and the First Lady, discussions with the IC regarding such interviews and depositions, and advice to the President, First Lady, and White House staff in connection with these interviews and depositions; advising whether the Office of the President should alter its policies in response to information developed by investigations of any of the above matters; seeking to ensure that the conduct of White House officials is presented accurately and portrayed without distortion in congressional hearings; ensuring that public statements regarding the matters under investigation are accurate; consulting with personal counsel for the President and the First Lady and personal counsel for White House staff on factual and legal points of mutual concern; and, in the latter connection, evaluating where the line is properly drawn between the President's and First Lady's

official and personal capacities and which functions are properly performed by White House counsel, which by personal counsel, and which by the two together. See Sherburne Dec. ¶¶ 7, 9 (App. 85a-87a); Affidavit of David E. Kendall ¶ 3 (App. 93a).

2. At issue in this litigation are lawyers' notes generated during two meetings among Mrs. Clinton, attorneys representing her in her personal capacity, and White House lawyers representing the Office of the President with regard to the concurrent IC and congressional investigations of Whitewater and related matters. The first meeting took place on July 11, 1995, and was attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, Associate Counsel to the President Miriam Nemetz, and David Kendall, a partner in the law firm of Williams & Connolly. Ms. Sherburne was the lawyer in the Office of the President with responsibility for providing advice to the White House in connection with Whitewater-related issues. Ms. Nemetz worked with Ms. Sherburne on these matters. Mr. Kendall represents Mrs. Clinton in her personal capacity in connection with the investigations of Whitewater and related matters. Ms. Nemetz took notes during the meeting (the "Nemetz notes"). Sherburne Dec. ¶¶ 11, 16 (App. 87a, 89a).

The July 11, 1995 meeting and related notes concerned Mrs. Clinton's activities in the period immediately following the death of Deputy Counsel Vincent Foster. Eleven days later, on July 22, 1995, the IC interviewed the First Lady extensively about this matter. In addition, the Senate Special Committee to Investigate Whitewater Development Corporation and Related Matters (the "Senate Whitewater Committee") began public hearings on the Foster matter on July 18, 1995. Ms. Sherburne and Ms. Nemetz were involved in gathering and analyzing the facts relating to this matter so that they could advise the Office of the President regarding the related grand jury and congressional investigations. Sherburne Dec. ¶¶ 14-17 (App. 88a-89a).

The second set of notes at issue was taken by Ms. Sherburne (the "Sherburne notes") during breaks in, and immediately following, Mrs. Clinton's appearance on January 26, 1996, before a federal grand jury in the District of Columbia working under the direction of the IC. Present were Mrs. Clinton, Ms. Sherburne, Mr. Kendall and his partner Nicole Seligman, and at times John Quinn, Counsel to the President. The meeting was a traditional "debriefing" of a witness regarding her grand jury testimony; that testimony principally concerned the January 1996 discovery of a copy of Rose Law Firm billing records in the White House Residence. This discovery had dominated the news for several weeks, and the Senate Whitewater Committee had initiated an investigation of the matter. Sherburne Dec. ¶¶ 18-21 (App. 89a-90a).

On June 21, 1996, nearly two years after taking over the Whitewater investigation from Mr. Fiske, Independent Counsel Starr issued to the White House a subpoena *duces tecum* calling for production of "*[a]ll* documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton" (emphasis added) regarding a wide range of subjects. App. 2a. The White House identified nine sets of notes in response to the subpoena, including the Nemetz notes and the Sherburne notes, but declined to produce them, stating that they were subject to claims of attorney-client and executive privilege and were also protected by the work product doctrine. See Letters from Jane C. Sherburne to John D. Bates (reprinted at IC App. 8-11).[1]

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[1] References to "IC App." and "White House App." denote the respective appendices filed in the court of appeals.

B. Proceedings Below

1. On August 19, 1996, the IC moved to compel production of the Nemetz notes and the Sherburne notes.[2] Following briefing and oral argument, the United States District Court for the Eastern District of Arkansas (Wright, J.) denied the motion to compel. App. 62a-83a. The court observed (*id.* at 73a-74a) that "it is generally accepted that the attorney-client privilege applies in the governmental context in civil cases," and it could discern no authority suggesting why the privilege should not likewise apply in the grand jury context (*id.* at 72a-73a). Moreover, the court recognized (*id.* at 74a) that there was a need in this case for both personal and governmental counsel to communicate with Mrs. Clinton: "Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers."

The district court nevertheless declined to reach the question whether an entity of the federal government may generally assert an attorney-client privilege in response to a grand jury subpoena. Taking a narrower approach, the court held (App. 82a) that "these notes are protected from disclosure by the reasonable belief of the White House and Mrs. Clinton that the communications were privileged * * *." "Even prior to the meetings at issue here, the White House Counsel's Office has generally considered confidential communications by its lawyers for the purpose of legal advice to be shielded by the attorney-client privilege." *Id.* at 73a. Because there was "no dispute that Mrs. Clinton, her personal counsel, and the White House lawyers all considered these meetings to involve confidential attorney-client

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[2] The IC did not pursue the other documents identified by the White House, which were notes and memoranda memorializing the IC's sworn depositions of the First Lady, which both White House lawyers and the First Lady's personal counsel attended.

communications" (*id.* at 76a), the court sustained the assertion of privilege.

As a second and independent ground for denying the motion to compel, the district court held (App. 81a) that the subpoenaed notes are also "work product of the type that is clearly protected from disclosure to the grand jury." The notes were prepared by counsel and plainly "reveal the attorneys' mental processes in evaluating the communications." *Ibid.* In addition, the court found (*id.* at 64a) that the notes were created in anticipation of litigation, because "at the time of the meetings at issue in this case, there was a considerable amount of legal activity taking place with respect to Whitewater related matters." The court accordingly held (*id.* at 81a) that "[t]he Nemetz and Sherburne notes are * * * work product" and, under Eighth Circuit precedent, were "absolutely protected from disclosure in [the] grand jury setting."

2. The court of appeals reversed by a divided vote. App. 1a-61a. The majority recognized that "the attorney-client privilege is the oldest known to the common law" (*id.* at 6a), and that the courts, commentators, and this Court's Proposed Federal Rule of Evidence 503 have "ma[de] it clear that '[t]he definition of "client" includes governmental bodies'" (*ibid.*). The majority concluded, however, that these authorities do not resolve "the particular situation before us in this case" (*ibid.*) because they did not involve an assertion of attorney-client privilege in the context of a federal grand jury investigation (*id.* at 5a).

The majority therefore approached the issue as if it were called upon "to establish[] a new privilege, which courts ordinarily undertake with great reluctance." App. 6a. Beginning with that premise, the majority concluded that a claim of attorney-client privilege simply could not be countenanced in this setting. It acknowledged that *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), "contains strong

language about the importance of the attorney-client privilege in encouraging the full and frank presentation of legal advice." App. 16a. It decided, however, that there were more important lessons to be learned from *United States* v. *Nixon*, 418 U.S. 683 (1974). Although "the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling," the majority nevertheless surmised (App. 15a) that "*Nixon* is indicative of the general principle that the need for confidentiality within the executive branch may be subordinated to the needs of the federal government's own criminal justice processes." "[M]ore importantly," the majority added, permitting the assertion of a governmental attorney-client privilege in this context would contravene what the majority termed "the general duty of public service," which "calls upon federal employees and agencies to favor disclosure over concealment." *Id.* at 17a.[3]

In addition, the majority held (App. 25a-27a) that the subpoenaed materials do not constitute protected work product because they were not prepared in anticipation of litigation. It observed (*id.* at 26a) that the IC has been investigating only White House *officials*, not the Office of the President, and that the government could not assert a work product claim merely because "some other person was anticipating litigation." *Ibid.* And although the majority recognized (*ibid.*) that the White House itself was anticipating adversarial congressional hearings at the time the subpoenaed notes were prepared, it held that such hearings did not constitute litigation for purposes of the work product doctrine.

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[3] Having determined that there is no governmental attorney-client privilege as against a federal grand jury, the majority held (App. 21a) that there accordingly could not be a "common interest" protection for communications made in the presence of both government attorneys and private counsel.

Judge Kopf dissented (App. 29a-61a), flatly rejecting (*id.* at 31a) the majority's refusal to accept "the well-recognized principle that the government, including the White House, is legitimately entitled to the attorney-client privilege (and the work-product doctrine)." In Judge Kopf's view (*id.* at 48a), "the White House had a legitimate institutional need for the advice of its lawyers so that, acting through people, including the First Lady, as it must, the White House could carefully and candidly respond to the Independent Counsel." And it "misses the point" of *Upjohn*, Judge Kopf added, simply to tell White House officials to talk to private counsel instead of government attorneys. *Id.* at 42a.

Concluding that petitioner enjoys an attorney-client privilege in this setting, the dissent next stated that under *United States* v. *Nixon* a court should apply a "balancing" test that weighs the interests of confidentiality secured by the privilege against the IC's need for the subpoenaed materials. App. 50a. In this case, however, Judge Kopf found it unnecessary to do so in light of the First Lady's *personal* privilege. *Id.* at 56a-57a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has issued an extraordinary and unprecedented decision that will substantially impair the ability of the Office of the President (and other federal agencies) to secure sound legal advice, particularly in the face of Independent Counsel investigations. Based on its premise that federal agencies must "favor disclosure over concealment" (App. 17a), the majority concluded that federal government entities may not assert a privilege to prevent the disclosure of confidential attorney-client communications (at least in the context of a federal grand jury subpoena) or assert work-product protection for legal work performed in preparation for legislative hearings or in connection with grand jury investigations of agency officials.

If the court of appeals were right, it would be markedly more difficult for government officials to obtain the candid and informed legal assistance necessary to the performance of their functions. Moreover, the logic of the panel's decision suggests that the Eighth Circuit would not honor the governmental attorney-client privilege in *any* context. Because the court's decision has such grave consequences for the government – and because it is so plainly wrong – further review is warranted.

I. THE DECISION BELOW MISAPPREHENDS THE BASIC PRINCIPLES OF ATTORNEY-CLIENT PRIVILEGE AND MISCONCEIVES THE ROLE OF GOVERNMENT LAWYERS

This Court held in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), that private entities such as a corporation enjoy an absolute privilege against the disclosure of confidential communications between their attorneys and persons whose relationship to the entity affords them information vital to the provision of legal advice to the entity. The privilege must be expansively construed and absolutely protected, the Court ruled, "in order that [the entity] could obtain legal advice." *Id.* at 394. Were the law otherwise, the privilege would become uncertain – and "[a]n uncertain privilege * * * is little better than no privilege at all." *Id.* at 393.

In asserting the attorney-client privilege in response to the IC's subpoena, the Office of the President sought only that protection accorded to non-governmental entities under *Upjohn*. Lawyers for the Office of the President communicated with the First Lady in confidence for the purpose of providing legal advice to their client. As the district judge expressly found, there was a surpassing need for *both* governmental *and* personal counsel to communicate with Mrs. Clinton: "Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers. App. 74a. White House

attorneys – no less than attorneys for private entities – have a duty to their client to "ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-391. And for that reason, White House attorneys – no less than attorneys for private entities – must be free to communicate, in confidence, with officials, employees, and other individuals within that entity who may possess information that bears on the formulation of sound legal advice. That is exactly what White House attorneys were doing on July 11, 1995 and January 26, 1996, when they met, in confidence, with Mrs. Clinton and her personal attorneys.

Significantly, the Eighth Circuit did not dispute that the notes at issue here would be covered by the attorney-client privilege if taken by an attorney for a private organization, rather than by an attorney for the government. Instead, it held that "an entity of the federal government" may not "use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury." App. 5a. This holding is indefensible from the standpoint of either precedent or public policy.

A. The Decision Below Substantially Impairs The Ability Of Federal Governmental Entities To Consult With Their Attorneys

1. Government agencies, no less than private clients, must have the benefit of sound legal advice in order to conduct their day-to-day affairs. "In the modern regulatory state, where agency decision-making is dominated by statutes and court rulings, lawyers play an extraordinarily powerful role." Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in GOVERNMENT LAWYERS 143, 157 (1995). Because "[e]ven public legal rights are contingent at their boundaries and subject to argumentation and dispute as to their precise extent" (Restatement of the Law (Third) Governing Lawyers, Proposed Final Draft No.

1 (Mar. 29, 1996) § 124 (hereafter "Restatement")), government agencies must have access to legal advice simply to know what the law is and what they must do to comply. Agencies likewise need the benefit of counsel "to resist claims and contentions that the agency considers legally or factually unwarranted." Restatement § 124. And, of course, government employees must be free to consult confidentially with government lawyers concerning the whole array of complex laws and regulations that govern public service – *e.g.*, conflicts of interest, ethics, or Hatch Act restrictions.

In discharging these obligations to their clients, government attorneys, like their private counterparts, must be able to speak in confidence with agency employees and officials. To paraphrase *Upjohn* (449 U.S. at 391), government employees "can, by actions within the scope of their employment, embroil the [agency] in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by [government] counsel if he is adequately to advise the client with respect to such actual or potential difficulties."

Absent a reliable expectation of confidentiality, however, government attorneys "will not be fully informed by the client" and will thus be impaired in assisting their client agency "'to obtain the full advantage of our legal system.'" *Upjohn*, 449 U.S. at 389, 391. Similarly, government attorneys, if they are to be truly candid with their clients, must be assured as well that their advice will be treated as confidential. Not surprisingly, therefore, "the generally prevailing rule" is that "governmental agencies and agents enjoy the same privilege as non-governmental counterparts." Restatement § 124.

That was certainly the assumption of Congress when it enacted Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). And it has been the firm position

taken by every Administration over the last 20 years, Democratic and Republican alike. As the Office of Legal Counsel summarized the point in a 1982 opinion: "Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector." *Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 495 (1982).[4]

2. The court of appeals recognized (App. 19a) that, by crafting a special exemption for federal grand jury proceedings, its decision would undermine the assurance of confidentiality in communications between government agencies and their lawyers. Nevertheless, the majority optimistically predicted that the decision would "not make the duties of attorneys who work in-house for the federal government *significantly* more difficult." *Ibid.* (emphasis added). This optimism is entirely unfounded.

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[4] See also *Memorandum for the Deputy Assistant Attorney General re: The Attorney-Client Relationship in Department of Justice Representation of Individual Employees and Release of Information Obtained During That Representation Under the Freedom of Information Act* (Aug. 30, 1978) (reprinted at White House App. 80a-96a); *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976) (reprinted at White House App. 60a-79a). Indeed, in the 1976 OLC Opinion, Assistant Attorney General (now Justice) Scalia expressly rejected (*id.* at 70a-71a) the proposition that the government attorney's duty to maintain the confidences of a client should be subject to a "balancing approach" that takes account of the competing "public interest in investigating and disciplining or prosecuting wrongdoers."

The majority first observed (App. 19a) that the White House "assumes that the attorney-client privilege is more predictable ex ante than it actually is." But the court's examples – disputes with counsel, the declaration of bankruptcy, and the raising of an advice-of-counsel defense – are all instances in which the privilege is vitiated by events *under the client's control.* A government agency can, of course, also choose to waive its privilege, but it is quite a different matter to say that the privilege is automatically wiped out when an Independent Counsel chooses to issue a grand jury subpoena.

The majority surmised, however, that "confidentiality will suffer only in those situations that a grand jury might later see fit to investigate." App. 19a. To begin with, that assumption overlooks the many cases (like this one) in which a grand jury *has already been convened.* In that event, the grand jury can be expected to "see fit" to investigate – and subpoena – any and every governmental attorney-client communication that bears even slightly on the underlying inquiry. Each day's new attorney-client communications about the investigation itself, or about the subject matter of the investigation, would be fair game.

Moreover, even in matters where grand jury interest has not yet emerged, it remains impossible for a client to know in advance when that might occur. Any conversation, no matter how innocuous, might later be the subject of grand jury inquiry. A grand jury, after all, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Experience shows that this is especially true of grand juries convened by Independent Counsels. As a recent alumna of IC Starr's office has noted, "the Special Division has provided ICs with very broadly worded jurisdictional mandates, and the courts have been willing to accept a very permissive reading of what 'related' matters ICs may legitimately pursue within those

mandates." O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 485-486 (1996). "Make no mistake about it," one former Independent Counsel has observed, "when you set an independent counsel in motion * * * no train is going to stop that independent counsel until he or she has thoroughly, and I underscore thoroughly, investigated the allegations which have been presented to them by the court." Statement of Joseph E. DiGenova, *Hearing before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 104th Cong., 2d Sess. 65, 67 (1996).

It is therefore cold comfort to tell federal agencies and employees that their confidential communications with counsel will be compromised "only" in those situations "that a grand jury might later see fit to investigate" (App. 19a). Under the court of appeals' ruling, attorney-client communications are just another investigative tool, and there is nothing other than the IC's own tactical judgment to prevent him from seeking access to the entire universe of attorney work product. Indeed, although privilege issues tend to be debated in the more antiseptic context of document production, it is important to recognize that, if the court below is correct, *every* IC would be free to turn *every* White House (or other government) lawyer into a witness. Nor, of course, is the problem confined to this investigation. Every other Independent Counsel, now and in the future, is virtually certain to make similar demands. Since 1978 there have been 17 Independent Counsel investigations, at least four of which remain open today. See Congressional Research Service, *Independent Counsel Provisions: An Overview of the Operation of the Law* (Apr. 2, 1997).

Finally, the court below suggested (App. 19a) that "[a]n official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney." But far from illuminating the answer, this

denigration of the role of government lawyers and the responsibilities of government clients merely restates the problem. The issue here is not whether the small number of government employees who fear they may have violated the law should retain private counsel. The court of appeals' ruling will discourage *all* government employees from speaking with government counsel when there is any chance that their statements, however innocuous, could pique the curiosity of a grand jury that is, or may be, investigating their activities. By encouraging government employees to speak only with private counsel, the majority both imposes an extraordinary burden on the employees and effectively deprives the government of critical information.

3. The court of appeals' decision would be damaging enough if all it did was to vitiate governmental attorney-client privilege in the context of federal grand jury proceedings. In fact, however, the ruling casts serious doubt on whether the Eighth Circuit would recognize a governmental attorney-client privilege in *any* setting, because nearly all of the reasons marshaled by the majority carry equivalent force outside the grand jury context.

That is certainly true of the majority's central rationale: that there is a "general duty of public service" that requires agencies and their attorneys "to favor disclosure over concealment." If that is so, why would it uniquely cover federal grand jury proceedings? Surely criminal defendants have equally strong claims to such materials. They, after all, have a constitutional right to compulsory process (the IC does not); thus, the agencies' "general duty * * * to favor disclosure" should require them to disclose otherwise privileged materials to indicted individuals as well. And what reasoned basis, given the premises of the decision below, exists for stopping there? Private plaintiffs in litigation with the federal government often seek to vindicate "the public interest" (App. 18a). The Eighth Circuit's newly-minted duty

of disclosure seemingly would require turning over otherwise privileged materials to them as well.

The majority's reading of *United States* v. *Nixon* – that otherwise privileged conversations must "be subordinated to the needs of the federal government's own criminal justice processes" (App. 15a) – has a comparable sweep. So too for the majority's reliance (*id.* at 17a) on the fact that governmental agencies cannot be indicted. In the first place, the existence of the privilege has never been thought to depend on whether the privilege holder is susceptible to indictment; otherwise an immunized person would lose his attorney-client privilege, which is surely not the law. Moreover, the majority's rationale proves too much. A federal agency also cannot be indicted in a case in which a criminal defendant seeks access to government attorney-client materials, or in a state grand jury investigation or trial, nor can it be made liable in a private *qui tam* action.

These implications may have caused the court of appeals little concern because, as it acknowledged at the outset (App. 5a), it was not prepared to concede that there is a governmental attorney-client privilege in *any* setting. But by deciding the case as it has, the majority has invited litigants and other courts to extend its supposedly limited ruling to a wide array of other contexts.

The uncertainties posed by the court of appeals' decision, both for the White House and for other governmental agencies, warrant further review and cannot await the next case. Agencies and their employees need to know, and know now, whether their communications with government counsel are likely to be compromised by grand jury inquiry.

B. The Court Of Appeals' Decision Is Wrong

If the decision below were correct, federal agencies would be obliged to accept this substantial impairment of their ability to consult with, and receive frank advice from,

counsel. In at least two respects, however, the decision – which the majority chose to apply retroactively to the communications with the First Lady – is deeply and indefensibly wrong: it carves out an unprecedented exception from the scope of the attorney-client privilege (which has never before been held to apply only in *certain* contexts but not others); and it rests on a misguided conception of what governmental agencies and their lawyers do for a living. A heavy burden falls to the proponent of such "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)), which neither the IC nor the majority below has carried.

1. The decision misapprehends basic principles of attorney-client privilege

The court of appeals' decision is rather "like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting). According to the majority, even if the Office of the President could assert a privilege had these notes been sought in civil discovery, or perhaps even for use in state criminal proceedings – nevertheless, in this purportedly special context, the privilege simply evaporates. There is absolutely no basis for carving out from the long-settled and time-honored principles of attorney-client privilege a special exception for federal grand jury subpoenas.

a. Although the court of appeals professed agnosticism on the point (App. 5a), there can be no question that the lower courts have recognized and applied the governmental attorney-client privilege in a wide array of contexts. As the majority conceded (*id.* at 10a), the courts have uniformly embraced the privilege in civil cases.[5] The

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[5] See, *e.g.*, *Wright* v. *OSHA*, 822 F.2d 642, 648 (7th Cir. 1987) (attorney-client privilege protects communications between OSHA and Solicitor of Labor); *Covington & Burling* v. *Food & Nutrition*

Restatement reflects this consensus view. Section 124, which was approved by the American Law Institute in May 1996 (see 64 U.S.L.W. 2739), is entitled "Privilege for Governmental Client" and states "the generally prevailing rule that governmental agencies and agents enjoy the **same** privilege as non-governmental counterparts." Comment b, at 409 (emphasis added). Similarly, the Advisory Committee's note to Proposed Fed. R. Evid. 503, dealing with the attorney-client privilege, provides that its "definition of 'client' includes governmental bodies." Advisory Comm. Note to Standard 503, Subdivision (a)(1).

Congress, too, has recognized the appropriateness of a governmental attorney-client privilege. Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." By its terms, Exemption 5 entitles the government to withhold under FOIA any documents that it would be privileged to withhold in litigation. And Congress made quite clear that the attorney-client privilege was one of the privileges available to the government. As this Court explained in *NLRB* v. *Sears,*

Service, 744 F. Supp. 314, 323 (D.D.C. 1990) (privilege protects communications between attorneys and officials of the FNS); *Donovan* v. *Teamsters Union Local 25*, 103 F.R.D. 550, 552 (D. Mass. 1984) ("[t]he attorney-client privilege does apply 'in the governmental context'"); *Green* v. *IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (the attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"), aff'd, 734 F.2d 18 (7th Cir. 1984); *SEC* v. *World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981) (privilege protects communications between SEC staff investigator and SEC attorneys); *Jupiter Painting Contracting Co.* v. *United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("[c]ourts generally have accepted that attorney-client privilege applies in the governmental context").

Roebuck & Co., 421 U.S. at 154, "[t]he Senate Report states that Exemption 5 'would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.'" Accord, *e.g.*, *Mead Data Central, Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (Exemption 5 "covers professional advice on legal questions which bears on [agency] decisions"). Congress, in short, authorized agencies to withhold materials on attorney-client privilege grounds precisely because such a privilege would be available to the agency in litigation.

b. The court of appeals also was wrong in asserting that it was writing on a clean slate. In conflict with the decision below, the Sixth Circuit has concluded that the governmental attorney-client privilege is available *in the context of grand jury proceedings*. In *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989), the City of Detroit sought to quash a federal grand jury subpoena seeking minutes of City Council meetings on the ground that the minutes were protected by the attorney-client privilege. The Sixth Circuit vacated the district court's order enforcing the subpoena and remanded the case for a determination whether the meetings were confidential under state law. The court plainly took *as a given* that a governmental attorney-client privilege can be asserted in a federal grand jury proceeding, otherwise its consideration of the factual question whether the predicates of the privilege had been satisfied would have been senseless. See also *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 241 N.J. Super. 18, 574 A.2d 449 (1989) (holding that an attorney employed by a county board of freeholders could not be made to reveal client communications to a grand jury investigating the county).[6]

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[6] The dearth of precedent on this point is no doubt due to the fact that (a) any such intrabranch disputes would ordinarily (outside

c. The court of appeals reasoned, however, that even if an attorney-client privilege would otherwise apply to these notes, the privilege simply disappears in the face of a federal grand jury subpoena. It must be said, at the outset, that the court's conception of attorney-client privilege is wholly unknown to the law. Until the decision below, no court had *ever* held that the attorney-client privilege applies in some contexts but not others. Rather, attorney-client privilege applies across the board; unless some exception to the privilege is present (and the majority identified none), the privilege applies *whatever* the context.

Thus, for example, no court had ever before held that the same attorney-client communication is privileged in some litigation settings but not others, for some corporate transactions but not others, in some criminal investigations but not others. If the attorney-client privilege were subject to such context-specific loopholes, it would be a highly uncertain protection: no client could possibly know whether his confidential communications to counsel will be fully protected. As this Court has cautioned, "[a]n uncertain privilege * * * is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Accord, *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1932 (1996).

The court of appeals' exception for federal grand jury proceedings thus entails a reformulation of the very idea of attorney-client privilege. None of the majority's reasons, however, justifies such a change in the law. True, "a grand jury has broad investigatory powers" (App. 13a), but courts

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the IC-type situation) be resolved by consultation between agency heads or, if necessary, by the chief executive, but not by the courts; and (b) no previous Independent Counsel has had the audacity or imagination to launch such a direct attack upon the seemingly well-established rights of government clients to unfettered assistance of counsel.

have regularly sustained attorney-client privilege claims in response to grand jury inquiries. See, *e.g.*, *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In re Grand Jury Subpoena*, 788 F.2d 1511 (11th Cir. 1986), modifying 765 F.2d 1014 (11th Cir. 1985). Nor does this Court's ruling in *Nixon* lend the slightest support to the decision below. Even the majority recognized (App. 15a) that *Nixon* "is not directly controlling" because the President never asserted attorney-client privilege in that case.

If anything, *Nixon* forecloses, not supports, the majority's decision. Although the *Nixon* Court agreed that "'the public * * * has a right to every man's evidence,'" it emphasized that there is an exception for "common-law * * * privileges," including for "an attorney or a priest[, who] may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709.

As for the court of appeals' refusal to apply the principles of *Upjohn*, here too its decision is flawed at every turn. That the White House cannot be indicted is beside the point, as it ignores the very premise of *Upjohn* – that clients need legal advice not only to fend off litigation but also so that they can know what their rights and duties are and thereby "promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389. And the majority's notion that corporate attorneys have a more compelling interest than government attorneys "in ferreting out any misconduct by employees" (App. 17a) rests on a strange concept of governmental responsibilities.[7]

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[7] The majority's reliance (App. 17a) on 28 U.S.C. § 535(b) for the proposition that government attorneys, unlike private attorneys, "are under a statutory duty to report criminal wrongdoing by other employees" is contrary to both the legislative history of the provision (see H.R. Rep. No. 2622, 83rd Cong., 2d Sess. (1954)) and the consistent interpretation of the Department of Justice. See *Memorandum for the Acting Assistant Attorney General re: Duty of*

2. The decision misconceives the role and responsibilities of federal government employees and attorneys

The majority's central rationale (App. 17a) is that "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." In the majority's view, "[t]he public responsibilities" of government entities are "reason enough to find *Upjohn* unpersuasive." *Id.* at 17a, 18a. That sentiment – which in the majority's estimation was "more important[]" (*id.* at 17a) to its resolution of the case than any other – reflects an oversimplified conception of how the federal government works, and a basic misapprehension about the roles and duties of federal government attorneys.

In the first place, the relevant issue is not "concealment," as the majority supposed. It is instead the appropriate balancing of the public's interest in the business of government and the need for confidentiality. And while the federal government has a general statutory obligation under FOIA, 5 U.S.C. § 552, to make its records available to the public, it is an utter non-sequitur to infer (as the majority does) that the government has some overarching "duty * * * to favor disclosure," regardless of the competing costs and benefits. Such an unnuanced conception of the functions of government ignores, among other things, the many exceptions to disclosure under FOIA (*id.* § 552(b)), which include material that would be protected by the attorney-client privilege or the work product doctrine in private litigation

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Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee (Mar. 29, 1985), at 4 (reprinted at White House App. 49a-59a). See also Opinion of Nov. 30, 1976, at 5-7 (White House App. 64a-66a); Opinion of Aug. 30, 1978, at 9-10 (White House App. 88a-89a); Opinion of Apr. 3, 1979, at 4 (White House App. 100a).

(see *supra* at 19-20). As the Court noted in *Nixon*, confidentiality in appropriate cases has been central to the proper functioning of the Republic ever since the Constitutional Convention – a gathering that was itself conducted in secret and the records of which were sealed for 30 years. 418 U.S. at 705 n.15.

The court of appeals' parallel belief that government attorneys cannot "shield" the information they learn from their agency clients is just as wrongheaded. Government lawyers are not "'independent auditor[s],'" as the majority mistakenly suggested (App. 17a); they are, instead, *attorneys*, first and foremost, as to whom (wholly unlike auditors) there is a venerable tradition of protected communications. And government attorneys are bound by much the same ethical and disciplinary rules as lawyers in the private sector, including the duty to maintain the confidentiality of client communications and client secrets. See ABA Informal Opinion 1413 (1978); D.C. Bar Ethics Opinion 148 (1985). In the District of Columbia, where a substantial number of government attorneys practice and where the attorney notes at issue in this case were created, the Rules of Professional Conduct provide that for purposes of the general obligation of client confidentiality, "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation or order." D.C. Rules of Professional Conduct, Rule 1.6(i).[8] Those rules preclude *all* lawyers – government and private alike – from disclosing a client's secrets except "[w]hen permitted by the[] Rules or required by law or court order,"

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[8] Although virtually all of the relevant events in this case took place in the District of Columbia, and the attorneys who took the subpoenaed notes were governed by D.C. Bar rules, the Independent Counsel elected to issue the subpoena out of his Arkansas grand jury, rather than out of his D.C. grand jury (where the First Lady had testified).

and provide an additional exception for government lawyers only for circumstances in which disclosure is "authorized by law." *Id.* Rule 1.6(d)(2).[9]

The court of appeals ignored these basic principles, opining instead that government agencies and employees have a duty to favor disclosure. That fundamental misconception about the relationship between the government and its lawyers lies at the very heart of the majority's evisceration of the attorney-client privilege in this case.[10]

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[9] The Comment to Rule 1.6 explains that the additional exception for government attorneys applies only in those situations in which the government authorizes or requires disclosure "by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity."

[10] The majority's peculiar conception of the responsibilities of government agencies and lawyers also impaired its analysis of the common interest issue. The majority agreed that both petitioner and the First Lady were "concerned with understanding fully the facts involved in the OIC's investigation," and that each had an interest in "dividing responsibility between the personal attorneys and White House counsel." App. 22a. But the majority discounted these concerns, and others (see *ibid.*), as "amount[ing] to no more than an assertion that 'we all want to obey the law'" — and in its view, the common-interest doctrine does not "stretch[] that far." But assisting clients, including governmental agencies, in understanding and "obey[ing] the law" is precisely what *Upjohn* is about. The majority simply never explained why the common interest doctrine — which even the majority recognized (*id.* at 21a) to be a "loose standard" — could not embrace such a core concern of the attorney-client privilege.

3. Even if petitioner's attorney-client privilege were not absolute in an IC investigation, it would still warrant far greater weight than the court of appeals gave it

Even if it were appropriate in an IC investigation to apply a balancing test in assessing claims of governmental attorney-client privilege, surely the privilege would not simply evaporate each time the IC made the unilateral decision to issue a grand jury subpoena. To the contrary, the balancing test articulated in *Nixon* to deal with the qualified executive privilege (and certainly any balancing test that might supplant the traditional absolute privilege for attorney-client communications) would require the IC to make a strong showing of need in order to overcome the protections of the privilege. Here, too, the court of appeals went astray by diluting to the vanishing point even the qualified privilege articulated in *Nixon*.

This Court ruled in *Nixon* that only a "demonstrated, *specific* need" for evidence, sufficient to persuade the trial court that the subpoenaed material is "'*essential* to the justice of the [pending criminal] case,'" would suffice to overcome the presumptive executive privilege for White House communications. 418 U.S. at 713 (emphasis added; brackets in the original). In *Nixon* itself, the Special Prosecutor sought the materials in connection with a *pending criminal trial* – a case in which indictments had issued of the very persons whose voices appeared on the subpoenaed tapes – and established both the "relevance" and the "admissibility" of the subpoenaed materials. *Id.* at 700-701. What is more, the Special Prosecutor demonstrated that "[t]he subpoenaed materials [were] not available from any other source * * *." *Id.* at 702. Thus, the Court ultimately concluded that the Special Prosecutor had made a showing sufficient to overcome the qualified executive privilege.

The court below read *Nixon* very differently. In its view (App. 13a n.9), the burden fell to petitioner (not the Independent Counsel) and required petitioner to show "'that there is no reasonable possibility that the category of materials the [IC] seeks will produce information relevant to the general subject of the grand jury's investigation.'" That burden, of course, is nothing more than what Fed. R. Crim. P. 17 would impose *in the absence of any privilege*. See *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991). In short, under the court of appeals' decision, the "balancing test" articulated in *Nixon* – if applicable in this context – would invariably be struck in the IC's favor, regardless of any showing of need. That cannot possibly be the law.

II. THE DECISION BELOW RESTS ON A MISTAKEN CONCEPTION OF THE WORK PRODUCT DOCTRINE

The court of appeals declined to apply the work product doctrine because, in its view, the subpoenaed notes were not "'prepared in anticipation of litigation.'" App. 25a. The court's cramped conception of "litigation," however, turns a blind eye to both legal and political realities.

A. The majority recognized (App. 26a) that the subpoenaed notes were created in preparation for congressional hearings involving the White House. It also acknowledged (*ibid.*) the Restatement's position that "litigation 'includes * * * an investigative legislative hearing.'" The present case illustrates why that is so. The notes were taken in connection with an effort to prepare the Office of the President for hearings before the Senate Whitewater Committee. That Committee's proceedings, which focused almost entirely on the White House, were no less adversarial than traditional litigation. The Chief Counsel, for example, was a former U.S. Attorney, and minority counsel a former Watergate prosecutor. Witnesses were grilled and rehabilitated, exhibits were introduced as at trial,

and at one point the Chief Counsel even gave a "summation" of his evidence to date.[11] And at the end of the process, findings of "fact" were issued by both the majority and minority, just as they might be by a judge or jury.

The policies that underlie the work product privilege are as fully implicated in a contentious and politically charged congressional hearing controlled by the opposition political party as they are in ordinary litigation. To the extent the subpoenaed notes were created in anticipation of these legislative hearings, the work product doctrine should apply. The alternative would permit the unseemly spectacle of calling government lawyers who helped prepare their agencies' representatives for congressional hearings and questioning them about the strategy they proposed to their clients.[12]

The majority declined to consider congressional hearings to be "litigation" because "the only harm that could come to the Agency as a result of such an investigation is political harm." App. 27a. It is not clear what the court of appeals meant by "political harm," but to the extent that the term encompasses a diminution in the ability of the Office of the President to deal with Congress or to garner public support for its positions or to focus its energies on the daily business of the executive branch, these elements of the "political" process lie at the very heart of our system of government. In any event, before this case no court (to our knowledge) had

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[11] See Maraniss, *The Hearings End Much as They Began*, Wash. Post, June 19, 1996, at A1; Melton, *For Whitewater Committee Counsel, a Painstaking Approach*, Wash. Post, Apr. 8, 1996, at A19.

[12] Under the court of appeals' decision, work product of counsel for *private* parties prepared in anticipation of legislative hearings would likewise be subject to disclosure.

ever held that a party must face a particular type of litigation *harm* before it may claim the work product protection.

B. The subpoenaed notes were also created in anticipation of ongoing grand jury proceedings that resulted in numerous document subpoenas to the White House and questioning of many White House employees and officials. The court of appeals held that this, too, was not "litigation" for purposes of the work product doctrine. In the court's view, the IC is investigating only White House *officials*, not the White House itself, and it could find no authority permitting a work product claim merely because "some other person," such as the First Lady, "was anticipating litigation." App. 26a.

Here, again, the court misunderstood the work product protection. Although the "White House" itself cannot be a party to a criminal or civil proceeding, its constituent parts certainly can. When the official conduct of key members of the White House is being investigated by a grand jury, the institutional interests of the Office of the President are obviously at stake. Moreover, the White House itself has been the recipient of numerous IC subpoenas, *including the one at issue in this proceeding*. In order for White House lawyers to represent their client's interests adequately, they must be able to record their thoughts and mental impressions freely, without fear that those documents will automatically be discoverable and that candid assessments might be used to call the operations of their client into question.

The majority's narrow conception of work product would greatly compromise the ability of government lawyers to represent their clients' broad institutional interests during criminal or civil investigations. Unless representation of those interests is to be accorded a lesser status than the myriad of other representations in which lawyers engage – and the court of appeals did not suggest why that should be so – the privilege is fully applicable in this setting.

* * * * *

There should be no mistake about the breadth and practical consequences of the Eighth Circuit's decision in this case. If the majority is correct, then the next step will be for the grand jury to require the White House Counsel or other government attorneys to testify about conversations with the President or other government officials concerning the legal advice they have given and the information they gathered in their internal investigations. If that is to be the law, it should be announced by this Court, not by a 2-1 majority of the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 1997

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[*] Pursuant to authorization of the Attorney General, undersigned counsel, serving as special government employees, have been assigned to represent the petitioner.

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-4108

In re: Grand Jury Subpoena Duces Tecum	* * * * *	Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: February 13, 1997

Filed: April 9, 1997

Amended and Unsealed: May 2, 1997

Before BOWMAN and WOLLMAN, Circuit Judges, and KOPF,[1] District Judge.

BOWMAN, Circuit Judge.

The Office of Independent Counsel (OIC) appeals from an order of the District Court denying the OIC's motion to compel the production of documents subpoenaed by a federal grand jury. We reverse and remand.

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

I.

The task assigned to Independent Counsel Kenneth W. Starr is to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994). Mr. Starr also is charged with the duty of pursuing evidence of other violations of the law developed during and connected with or arising out of his primary investigation, known generally as "Whitewater." See *id.* *See generally United States v. Tucker*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

On June 21, 1996, as part of its investigation, the OIC directed to the White House a grand jury subpoena that required production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)" pertaining to several Whitewater-related subjects. Subpoena Rider at 1. The White House identified nine sets of notes responsive to the subpoena but refused to produce them, citing executive privilege, attorney-client privilege, and the attorney work product doctrine.

On August 19, 1996, the OIC filed a motion before the District Court to compel production of two of the nine sets of documents identified by the White House. The first set of documents comprises notes taken by Associate Counsel to the President Miriam Nemetz on July 11, 1995, at a meeting attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney, David Kendall. The subject of this meeting was Mrs. Clinton's activities following the death of Deputy Counsel to the President Vincent W. Foster, Jr. The documents in the second collection are notes taken by Ms. Sherburne on January 26,

1996, during meetings attended by Mrs. Clinton, Mr. Kendall, Nicole Seligman (a partner of Mr. Kendall's), and, at times, John Quinn, Counsel to the President. These meetings, which took place during breaks in and immediately after Mrs. Clinton's testimony before a federal grand jury in Washington, D.C., concerned primarily the discovery of certain billing records from the Rose Law Firm in the residence area of the White House.

The White House abandoned its claim of executive privilege before the District Court, relying solely on the attorney-client privilege and the work product doctrine. Mrs. Clinton also entered a personal appearance through counsel in the District Court and asserted her personal attorney-client privilege. The District Court found it unnecessary to reach the broadest question presented by the OIC, whether a federal governmental entity may assert the attorney-client privilege or the work product doctrine in response to a subpoena by a federal grand jury. Instead, the court concluded that because Mrs. Clinton and the White House had a "genuine and reasonable (whether or not mistaken)" belief that the conversations at issue were privileged, the attorney-client privilege applied. Memorandum Opinion and Order at 20. In addition, the court held that the work product doctrine prevented disclosure of the notes to the grand jury. See *id.* at 22.

The OIC appealed, and we granted expedited review. Mrs. Clinton moved to intervene formally, and we granted her motion. The case was submitted following oral arguments in a closed session. The District Court did not find it necessary to examine the disputed materials in camera, see *id.* at 18 n.10, and neither do we.[2]

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[2] We wish to commend the parties on the quality of their briefs and oral arguments despite the expedited appeal process.

At the request of the White House, and in order to preserve the secrecy of the grand jury's proceedings, we filed our opinion under seal on April 9, 1997, intending to publish a redacted opinion shortly thereafter. Since we filed our opinion, however, press reports have related some of the substance of our decision. Believing that these disclosures have portrayed the White House in an unfairly negative light, the White House and Mrs. Clinton moved this Court to publish its opinion and to unseal the briefs and appendices filed in this Court, and the OIC joined in the motion. The motion is granted. Accordingly, this opinion, as amended, together with Judge Kopf's dissent, is released for publication, and the briefs and appendices are ordered unsealed.

II.

We first consider our jurisdiction to entertain this appeal. An order of a district court denying a motion to quash a grand jury subpoena--that is, an order requiring compliance with the subpoena--is not immediately appealable. *See Cobbledick v. United States*, 309 U.S. 323, 327-28 (1940). *But see United States v. Nixon*, 418 U.S. 683, 691-92 (1974) (determining that, in unique context of case, President could appeal without first being cited for contempt). This case presents the opposite situation: an order refusing to require compliance with a subpoena. An order granting a motion to quash a subpoena is an appealable order, either under 18 U.S.C. § 3731 (1994) (permitting government to appeal from an order "excluding evidence . . . in a criminal proceeding"), or under 28 U.S.C. § 1291 (1994) (permitting appeals from "all final decisions of the district courts"). See *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 967-68 (5th Cir. Unit B June 1981); *In re Grand Jury Empanelled Feb. 14, 1978 (Colucci)*, 597 F.2d 851, 854-58 (3d Cir. 1979). It makes no practical difference that the instant case involves the denial of a motion to enforce a subpoena rather than the grant of a motion to quash a subpoena. We conclude that we have jurisdiction over this appeal.

Although this case is a dispute between two entities of the federal government, i.e., the White House and the OIC, it presents a justiciable controversy. See *Nixon*, 418 U.S. at 697.

III.

We will address first the issue that the District Court found it unnecessary to decide: whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury. Before we confront the merits of this question, however, we believe it is important to identify what is not at issue in this case. The OIC does not seek to invade the attorney-client relationship existing between Mrs. Clinton, in her personal capacity, and Mr. Kendall, her personal lawyer. The privilege set up by the White House is strictly a governmental privilege, with the White House (or the Office of the President, alternatively) as client and Ms. Sherburne and Ms. Nemetz as attorneys. Accordingly, the White House is the real party in interest in this case, although Mrs. Clinton presents arguments similar to those of the White House in her capacity as an intervenor.

The discussion that follows can be summed up rather simply. We need not decide whether a governmental attorney-client privilege exists in other contexts, for it is enough to conclude that even if it does, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury.

A.

"[T]he privilege of a witness, person, government, State, or political subdivision thereof [is] governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. We must therefore apply the federal common law of attorney-client privilege to the situation presented by this case. See *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994).

The OIC and the White House have taken strikingly different rhetorical approaches to the question presented here. The OIC argues that recognizing an attorney-client privilege in these circumstances would be tantamount to establishing a new privilege, which courts ordinarily undertake with great reluctance. The White House, in contrast, argues that the attorney-client privilege is already the best-established of the common-law privileges and that, furthermore, it is an absolute privilege. The White House is correct, of course, in its assertion that the attorney-client privilege is the oldest known to the common law. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But the lengthy roots of the privilege do not necessarily mean that it must apply in this dispute within the federal government, especially because the privilege has not previously been so applied. Nor does the White House advance its case significantly by arguing that the attorney-client privilege is absolute, in the sense that it cannot be overcome by a showing of need. See, *e.g.*, *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493-94 (9th Cir. 1989). This argument merely begs the true question, whether a governmental attorney-client privilege exists at all in the context of a federal criminal investigation.

We address this question by beginning with Proposed Federal Rule of Evidence 503, which we have described as "a useful starting place" for an examination of the federal common law of attorney-client privilege. *In re Bieter Co.*, 16 F.3d at 935. As promulgated by the Supreme Court in 1972, Proposed Rule 503 would have defined "client" to include "a person, public officer, or corporation, association, or other organization or entity, either public or private." Proposed Fed. R. Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). The commentary makes it clear that "[t]he definition of 'client' includes governmental bodies." *Id.* advisory committee's note. But neither the proposed rule nor the commentary has anything to say about the particular situation before us in this case; they

represent only the broad proposition that a governmental body may be a client for purposes of the attorney-client privilege.[3]

Other compilations of the general law have taken similar approaches. *See* Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) [hereinafter Restatement] ("[T]he attorney-client privilege extends to a communication of a governmental organization.");[4] Unif. R. Evid. 502(a)(1) (defining "client" in terms similar to Proposed Fed. R. Evid. 503). Each of these authorities, however, expresses at least some concern about applying the privilege broadly to governmental entities. Uniform Rule 502 limits the governmental privilege to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will "seriously impair" the agency's pursuit of

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[3] Judge Kopf's dissent relies too heavily, we believe, on the precise wording of Proposed Rule 503. Although we have found the proposed rule accurate in other cases that have come before us, *see In re Bieter Co.*, 16 F.3d at 935, it bears repeating that we are instructed by Rule 501 to interpret the attorney-client privilege "in light of reason and experience" and not solely in light of the rule promulgated by the Supreme Court in 1972. Even the Court itself at times has interpreted privileges differently from the rules it proposed. *See Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 (1996) (concluding that psychotherapist-patient privilege encompasses communications to social workers, contrary to Proposed Rule 504); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (recognizing marital privilege entirely different from Proposed Rule 505).

[4] The American Law Institute has approved the chapter of Proposed Final Draft No. 1 of the Restatement governing the attorney-client privilege and the work product doctrine. *See* 64 U.S.L.W. 2739 (May 28, 1996).

the investigation or litigation. *See* Unif. R. Evid. 502(d)(6).[5] Language in the Restatement addresses even more directly the concerns relevant in the instant case:

> More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.

Restatement § 124 cmt. b. We agree with this language from the Restatement and accordingly look to the case law for further guidance.

The White House has located only two cases involving a clash between a grand jury and a claim of governmental attorney-client privilege. In *In re Grand Jury Subpoenas Duces Tecum (Farber)*, 574 A.2d 449 (N.J. Super. Ct. App. Div. 1989), a New Jersey intermediate appellate court considered two subpoenas issued by a county grand jury to private lawyers who had been retained to represent a county agency. The court concluded that "the privilege is fully applicable to communications between a public body and an attorney retained to represent it," *id.* at 454, but reversed the lower court's order quashing the subpoenas because the attorneys should have been required to appear before the grand jury and invoke the privilege in response to specific questions, *see id.* at 458. In *In re Grand Jury Subpoena (Doe)*, 886 F.2d 135 (6th Cir. 1989), the Sixth Circuit considered a subpoena issued by a federal grand jury to the city of Detroit. The court vacated the district court's finding that the city council was not the

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[5] The White House correctly points out that a number of the states adopting the Uniform Rules have omitted the limitation in Rule 502(d)(6). *See, e.g.*, Neb. Rev. Stat. § 27-503(4) (1995). These omissions, however, prove no more than does the lack of specific language in Proposed Federal Rule 503.

client of the city's corporation counsel but concluded that the application of the attorney-client privilege depended on the confidentiality of the communications, which in turn depended on the proper application of the state open-meetings law. *See id.* at 138. The court remanded the case to allow the district court to resolve that issue. *See id.* at 139.

For several reasons, we do not find these cases particularly persuasive. First, neither court actually applied a governmental attorney-client privilege to block a grand jury's investigation; both found it necessary to remand for further proceedings. We hesitate to ignore judicial pronouncements too readily as mere dicta, however, for we must find guidance somewhere in the parties' proffered authorities, none of which is directly in point. Several significant factual distinctions between the aforementioned cases and the case at bar are therefore also relevant. The New Jersey case involved the interaction between a county grand jury and a county agency, a subject which is undoubtedly of considerable importance to the state of New Jersey but does not bear directly on the relationship of a federal grand jury to a federal entity. In addition, that case involved private attorneys hired as special counsel to the county agency, and the court recognized that the private lawyers were not subject to a state statute requiring all public employees to testify before any grand jury in exchange for use immunity. *See In re Grand Jury (Farber)*, 574 A.2d at 455. It is, of course, impossible for us to determine how the New Jersey court would have harmonized this statute with the asserted governmental attorney-client privilege if the attorney involved had been a public employee. The Sixth Circuit case, involving a standoff between a federal grand jury and a city government, implicates potentially serious federalism concerns not present in the case before us. The court's brief opinion is also rather unpersuasive legally, as it contains no acknowledgment that to extend the privilege to a governmental body where individuals within the government are being scrutinized by a grand jury for criminal activity poses anything but a routine concern. (The

court cited only two privilege cases, neither of which had anything to do with government lawyers.)

Moving somewhat further afield, the White House cites a number of cases in which courts have applied a governmental attorney-client privilege in civil actions. These cases, all of which involved either the sui generis jurisprudence of the Freedom of Information Act (5 U.S.C. § 552 (1994))[6] or a situation in which the party seeking information was a private litigant adversarial to the government,[7] are not particularly

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[6] *See Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977); *Covington & Burling v. Food & Nutrition Serv.*, 744 F. Supp. 314, 323 (D.D.C. 1990); *Badran v. United States Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987); *Green v. IRS*, 556 F. Supp. 79, 85-86 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (table); *cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (concluding that work product doctrine applies in FOIA cases); *Wright v. OSHA*, 822 F.2d 642, 648 (7th Cir. 1987) (holding that FOIA exemption for records compiled for law enforcement purposes incorporates attorney-client privilege); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 489 (Cal. Ct. App. 1968) (noting, in action under state public meeting act, that California cases have assumed that public agencies may assert privilege). *But cf. City of N. Miami v. Miami Herald Publ'g Co.*, 468 So. 2d 218, 220 (Fla. 1985) (ruling that state public records act does not exempt communications between attorneys and governmental clients, except during pendency of litigation); *News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 17 (N.C. 1992) (holding that state public records act exempts only written communications from attorney to governmental client, and only for three years).

[7] *See Scott Paper Co. v. United States*, 943 F. Supp. 489, 498-500 (E.D. Pa.) (Magistrate Judge) (dicta), *aff'd*, 943 F.

persuasive in the circumstances of this case. Even if we were to conclude that the governmental attorney-client privilege ordinarily applies in civil litigation pitting the federal government against private parties, a question that we need not and do not decide, we believe the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue. *See Nixon*, 418 U.S. at 712 n.19 (suggesting that executive privilege may apply differently in criminal and civil cases); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 n.9 (8th Cir. 1972) (recognizing that reporter's privilege may apply differently in criminal and civil cases), *cert. denied*, 409 U.S. 1125 (1973); *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981) (same).

Lacking persuasive direction in the case law, we turn to general principles.

Supp. 501 (E.D. Pa. 1996); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550, 552-53 (D. Mass. 1984); *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 66-67 (N.D. Ga. 1981); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980); *Thill Sec. Corp. v. New York Stock Exch.*, 57 F.R.D. 133, 138-39 (E.D. Wis. 1972); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77, 78 (S.D.N.Y. 1970); *United States v. Anderson*, 34 F.R.D. 518, 522-23 (D. Colo. 1963); *cf. In re Allen*, 106 F.3d 582, 600 n.8 (4th Cir. 1997) (noting that private party did not challenge applicability of privilege to government agency); *Mitzner v. Sobol*, 136 F.R.D. 359, 360-62 (S.D.N.Y. 1991) (suggesting that state agency may assert privilege) (dicta); *Bruce v. Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1986) (holding that city agency may assert privilege); *State ex rel. Babbitt v. Arnold*, 548 P.2d 426, 428 (Ariz. Ct. App. 1976) (holding that county may assert privilege).

> "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."

United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 J. Wigmore, *Evidence* § 2192 (3d ed. 1940)). Privileges, as exceptions to the general rule, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. It is appropriate to recognize a privilege "'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

Federal common law recognizes a privilege only in rare situations. *See, e.g., Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 (1996) (adopting psychotherapist-patient privilege); *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (rejecting academic peer review privilege); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (rejecting work product immunity for accountants); *Upjohn*, 449 U.S. at 390, 397 (assuming, and effectively deciding, that corporation may assert attorney-client privilege); *United States v. Gillock*, 445 U.S. 360, 373 (1980) (rejecting speech-or-debate privilege for state legislators); *Trammel*, 445 U.S. at 51-53 (rejecting privilege against adverse spousal testimony, but continuing to recognize privilege for confidential marital communications); *Nixon*, 418 U.S. at 705-13 (recognizing qualified executive privilege); *Couch v. United*

States, 409 U.S. 322, 335 (1973) (rejecting accountant-client privilege); *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (rejecting news reporter's privilege);[8] *In re Grand Jury (Virgin Islands)*, 103 F.3d 1140, 1146-47 (3d Cir. 1997) (rejecting, like eight other circuits, parent-child privilege); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992) (rejecting insurer-insured confidentiality privilege); *United States v. Holmes*, 594 F.2d 1167, 1171 (8th Cir.) (rejecting probation officer-parolee privilege), *cert. denied*, 444 U.S. 873 (1979).

The White House does not dispute that a grand jury has broad investigatory powers.[9] As the Supreme Court has

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[8] Some courts have interpreted *Branzburg* as establishing a qualified news reporter's privilege. See *Shoen v. Shoen*, 5 F.3d 1289, 1292 & n.5 (9th Cir. 1993). *But see In re Grand Jury Proceedings (Storer)*, 810 F.2d 580, 583-86 (6th Cir. 1987) (rejecting this theory). Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit.

[9] The White House does suggest that the OIC has not shown a "demonstrated, specific need" for the materials subpoenaed by the grand jury, citing *Nixon*, 418 U.S. at 713. We doubt that this language from *Nixon* constitutes the proper need threshold even on the facts of that case, as it appears in a general discussion, rather than in the Court's specific analysis of Fed. R. Crim. P. 17(c). See *id.* at 700. In a grand jury case, the burden is on the subpoenaed party to demonstrate "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991); *see also In re Grand Jury Proceedings (Cheetham)*, 791 F.2d 663, 665-66 (8th Cir. 1986) (recognizing that no showing of need for information is required). The White House's own descriptions

recognized, the principle that the public is entitled to "every man's evidence" is "particularly applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688. "[O]ur historic commitment to the rule of law," and particularly to the twin goals of criminal justice "'that guilt shall not escape or innocence suffer,'" are strong factors weighing against the applicability of a privilege. *Nixon*, 418 U.S. at 708-09 (citation omitted).

In essence, the parties' arguments center on two cases, neither of which is directly analogous to this case, but each of which has relevance to our decision: *Nixon* and *Upjohn*. In *Nixon*, a special prosecutor directed a subpoena duces tecum to President Nixon, seeking tapes and other materials for use in the criminal trial of seven defendants, including former White House officials. The President refused to comply with the subpoena, claiming executive privilege. After concluding that the special prosecutor had made the showing required by Federal Rule of Criminal Procedure 17(c) for a trial subpoena, *see id.* at 700, the Supreme Court considered the President's claim of privilege. The Court recognized that the need for confidential presidential communication "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties," *id.* at 705, and that the privilege for presidential communications "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," *id.* at 708. Despite the strong constitutional foundations of the privilege, however, the Court concluded that it had to give way to the special prosecutor's subpoena:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production

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of the notes at issue in this case are sufficient to demonstrate their relevance to the OIC's investigation.

> of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

Id. at 712-13.

The OIC argues that under the logic of *Nixon*, the White House's claim of privilege must give way here, for if the governmental attorney-client privilege exists at all, it is certainly not constitutionally based. It is true, as the White House responds, that the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling. We agree with the OIC, however, that *Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes.

The White House counters by pointing out that *Nixon* itself recognized the importance of common-law privileges, including the attorney-client privilege. *See id.* at 709-10. No one, the White House argues, would suppose that the special prosecutor could compel the production of notes made by a private lawyer concerning a conversation with a private client about even the most routine traffic ticket. Why then, the argument continues, should the benefit of this important privilege not be available to the White House?

Our discussion of the White House's primary argument, revolving around *Upjohn*, should demonstrate why we believe the private-attorney analogy is inapposite. The White House proffers *Upjohn* as emblematic of the wide sweep of the attorney-client privilege, and we agree with that characterization, to a point. In *Upjohn*, the IRS attempted to

subpoena records of an internal investigation conducted by Upjohn's general counsel. The court of appeals rejected Upjohn's claim of privilege to the extent that the communications at issue involved lower-level employees outside the so-called "control group." The Supreme Court rejected the "control group" test as unnecessarily restrictive, recognizing that if the attorney-client privilege is to have any value, it must encompass communications between attorneys and lower-level employees possessing relevant information:

> In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below--'officers and agents . . . responsible for directing [the company's] actions in response to legal advice'--who will possess the information needed by the corporation's lawyers. Middle-level--and indeed lower-level--employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Upjohn, 449 U.S. at 391 (alterations by Supreme Court). The Court did not specify the precise extent of the privilege but specifically rejected the "control group" test. *Id.* at 396-97.

As the White House points out, *Upjohn* contains strong language about the importance of the attorney-client privilege in encouraging the full and frank presentation of legal advice to corporations, which helps to insure that corporations will act within the law. *See id.* at 389, 392. And the Court recognized that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with

some degree of certainty whether particular discussions will be protected." *Id.* at 393. Nevertheless, we believe that important differences between the government and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case. First, the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability. (No one suggests that any of the conduct under investigation by the OIC could expose the White House to civil liability.) A corporation, in contrast, may be subject to both civil and criminal liability for the actions of its agents, and corporate attorneys therefore have a compelling interest in ferreting out any misconduct by employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton.

We also find it significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. *See* 28 U.S.C. § 535(b) (1994). Even more importantly, however, the general duty of public service calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case. The importance of the public interest in questions of disclosure versus privilege is not unique to this case, for it was a key reason the Supreme Court rejected the concept of work product immunity for accountants:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the

> client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

Arthur Young, 465 U.S. at 817-18. The public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications. We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. *See also Jupiter Painting*, 87 F.R.D. at 598 (recognizing the "pernicious potential" of a governmental attorney-client privilege "in a government top-heavy with lawyers").[10]

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[10] Judge Kopf cites several opinions of the Office of Legal Counsel for support. *See post* at 41-45. We find each of these opinions unpersuasive in the context of this case. Theodore Olson's 1982 opinion concerning the confidentiality of communications between the President and the Attorney General relies significantly on Freedom of Information Act cases and *Upjohn*, which we believe are not helpful to the White House in this case, and does not purport to address the viability of the privilege in the face of a grand jury subpoena. *See Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490-97 (1982). Each of the other opinions cited by the White House involves a government attorney representing a government official sued in

We recognize the White House's concern that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Our first response is that the White House assumes that the attorney-client privilege is more predictable ex ante than it actually is. A client discussing an issue with a lawyer cannot know, for example, whether a bankruptcy trustee will later waive the privilege, *see Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985), or whether the lawyer's assistance will later become an issue in a proceeding, *see* Restatement § 130(1), or whether the lawyer and client will later become involved in a dispute, *see* Restatement § 133, any of which may result in disclosure of the conversation. Even so, we believe our holding in this case does not make the duties of government attorneys significantly more difficult. Assuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official--except for potential criminal wrongdoing by that official--without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

Nor do we foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is

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his or her individual capacity in a *Bivens* action. In such a case, the government attorney enters into a personal attorney-client relationship with the individual defendant, and the usual privilege applies. *See* 28 C.F.R. § 50.15(a)(3) (1996). No such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys.

contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice, which would be unlikely anyway. Like the *Nixon* Court, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Nixon*, 418 U.S. at 712. The White House's "chilling effect" argument is no more persuasive in this case than it was in *Nixon*.

B.

Before we can conclude that the White House may not use the attorney-client privilege to thwart the grand jury's subpoena, we must consider the assertion, made by both the White House and Mrs. Clinton, that the presence of Mr. Kendall, Mrs. Clinton's private attorney, during her meetings with the White House attorneys affects the calculus in this case. We disagree.

The White House and Mrs. Clinton rely on the common-interest doctrine, which expands the coverage of the attorney-client privilege in certain situations:

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Restatement § 126(1); *see also* Proposed Fed. R. Evid. 503(b)(3), 56 F.R.D. at 236. This doctrine softens the ordinary requirement that lawyer-client communications must be made in confidence in order to be protected by the privilege. *See*

Restatement § 121; *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 913 F.2d 544, 555-56 (8th Cir. 1990) (applying the doctrine), *cert. denied*, 500 U.S. 905 (1991).

One possible interpretation of the meetings at issue here is that they involved Mrs. Clinton in her personal capacity, her personal attorney, Mrs. Clinton as a representative of the White House (which we assume for the sake of argument would put her there in an official capacity), and the White House's official attorneys, in a type of four-sided conference. We will assume this scenario as a factual framework for the possible application of the common-interest doctrine. We conclude that the doctrine is inapplicable, for two distinct reasons.

First, as our discussion in Part III-A, *supra*, demonstrates, the White House's assumption that communications made by Mrs. Clinton to Ms. Sherburne and Ms. Nemetz "otherwise qualif[y] as privileged," Restatement § 126(1), begs the question we are called upon to decide. In addition, there is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest. The common interest may be "either legal, factual, or strategic in character," *id.* cmt. e, but no legitimate interest offered by the White House meets even this loose standard. Most of the interests put forward by the White House are summed up in this excerpt from its brief:

> Both [the White House and Mrs. Clinton] needed a full and accurate understanding of the facts surrounding the various incidents under investigation and of the legal consequences of those facts; both had an interest in ensuring that there was no distortion of

> these events by political and legal adversaries, and no misunderstanding of them by the public.

Br. of White House at 27. In addition, the White House and Mrs. Clinton cite the need for allocation of responsibility between personal and public attorneys, the desire to determine whether any White House policies need to be altered to prevent future difficulties, the fact that the OIC is investigating "official misconduct," and the ongoing Whitewater-related investigations by the RTC, FDIC, and Congress as factors creating a common interest between them.

We have no doubt that the White House and Mrs. Clinton are concerned with understanding fully the facts involved in the OIC's investigation, nor that dividing responsibility between the personal attorneys and White House counsel can be a difficult task. And surely the multiplicity of investigating authorities only complicates the lives of these attorneys. But these justifications amount to no more than an assertion that "we all want to obey the law." We do not believe the common-interest doctrine stretches that far.

As for the suggestion that the OIC is investigating "official misconduct," thus triggering the interest of the White House, we believe there is a difference between "official misconduct"--whatever that may be--and "misconduct of officials." The OIC is actually investigating the actions of individuals, some of whom hold positions in the White House. The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically. But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same

canoe as Mrs. Clinton, whose personal liberty is potentially at stake.

The White House argues that it must be permitted to invoke the attorney-client privilege "'not for the benefit of the President as an individual, but for the benefit of the Republic.'" *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting the Solicitor General's brief filed in that case). Because, however, the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests, the attempt must fail.

C.

We next confront the conclusion of the District Court that Mrs. Clinton's reasonable belief that her conversations with White House lawyers were privileged is sufficient to prevent their disclosure. Because we conclude that this issue is irrelevant to the inquiry at hand, we need not examine whether Mrs. Clinton's belief was reasonable.

In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant. For example, courts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer,[11] reasonably believed that a lawyer represented the client rather than another party,[12] or reasonably believed that a conversation

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[11] *See United States v. Mullen & Co.*, 776 F. Supp. 620, 621 (D. Mass. 1991) (dicta); *United States v. Tyler*, 745 F. Supp. 423, 425-26 (W.D. Mich. 1990); *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981) (dicta). *See generally* Restatement § 122(1).

[12] *See United States v. Hart*, No. Crim. A. 92-219, 1992 WL 348425, at *1-2 (E.D. La. Nov. 6, 1992); *cf. Wylie v. Marley Co.*, 891 F.2d 1463, 1471-72 (10th Cir. 1989) (finding no abuse of discretion in district court's application of privilege where

with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else.[13] All these situations involve, in essence, reasonable mistakes of fact, none of which is applicable here. Because Mrs. Clinton does not claim that she believed that the White House lawyers represented her personally, her argument must be that she believed that the law sweeps broadly enough to cloak these conversations within the attorney-client privilege.[14] But we know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.

As the OIC notes, only rarely does the law take account of an actor's beliefs about the law at the time he or she took action: the doctrine of qualified immunity, the non-applicability of new rules of constitutional law to federal habeas petitions brought by state prisoners, and the good-faith exception to the warrant requirement are perhaps the best examples. Without delving into the policy reasons behind these

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relationship of employee to employer's attorney was confusing).

[13] *See United States v. Moscony*, 927 F.2d 742, 752 (3d Cir.), *cert. denied*, 501 U.S. 1211 (1991); *Griffith v. Davis*, 161 F.R.D. 687, 694-95 (C.D. Cal. 1995). *See generally* Restatement § 121.

[14] Mrs. Clinton bases her argument in part on the confidentiality obligations of attorneys licensed in the District of Columbia. *See D.C. Rules of Professional Conduct* Rule 1.6 (1996). The commentary to that very rule, however, states that it is not intended to govern the scope of the attorney-client privilege, *see id.* cmt. 5, and we have previously held that ethical rules do not alter the privilege. *See United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995).

exceptional legal doctrines, we are satisfied that there is no compelling reason that a reasonable-mistake-of-law rule should apply in the realm of privileges. *See Trammel*, 445 U.S. at 53 (overruling earlier case that had upheld privilege against adverse spousal testimony and affirming defendant's conviction, despite possible reliance on prior law).

D.

For the reasons stated, we conclude that the White House may not use the attorney-client privilege to avoid complying with the subpoena issued in this case by a federal grand jury calling for the notes in question of Ms. Nemetz and Ms. Sherburne.

IV.

The District Court held that the work product doctrine also applied in this case to protect the White House attorneys' notes from disclosure. We disagree.

The work product doctrine sharply limits the access of an opponent to materials "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("materials obtained or prepared by an adversary's counsel with an eye toward litigation"); Restatement § 136(1) (material "prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation"). The White House's claim of work product immunity founders on the "anticipation of litigation" requirement of the doctrine.

Courts have applied work product immunity in a variety of legal contexts. *See Hickman*, 329 U.S. at 513-14 (civil case); *United States v. Nobles*, 422 U.S. 225, 238 (1975) (criminal case); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 846-47 (8th Cir. 1973) (grand jury investigation). The essential element of each case, however, is that the attorney was preparing for or anticipating some sort of adversarial

proceeding involving his or her client.[15] The White House's argument that its lawyers were preparing for the OIC's investigation is simply unpersuasive; as we have stated previously, the OIC is not investigating the White House, nor could it do so. White House officials may be under investigation on account of their individual acts, but we know of no authority allowing a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation.[16] *Cf. In re California Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989) (concluding that non-party to litigation may not assert work product doctrine).

As a fall-back position, the White House suggests that anticipated congressional hearings will suffice as well as anticipated litigation. The Restatement seems to agree with the White House. *See* Restatement § 136 cmt. h (stating that litigation "includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing"). Neither the White House, Mrs. Clinton, nor the Restatement cites any authority for this proposition, however, and we have discovered none. *Cf. P. & B. Marina, L.P. v. Logrande*, 136 F.R.D. 50, 58-59 (E.D.N.Y. 1991) (finding letters from lobbyist to client not protected work product), *aff'd*, 983 F.2d 1047 (2d Cir. 1992) (table). Even if it could be said that the White House anticipated a congressional investigation of the White

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[15] Work product immunity may be asserted by either the client or the attorney. *See, e.g., In re Sealed Case*, 676 F.2d 793, 809 & n.56 (D.C. Cir. 1982).

[16] Even if there is a common-interest work product doctrine, *see United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980), our earlier holding that the White House and Mrs. Clinton share no relevant common interest makes the doctrine inapplicable here.

House itself, rather than merely of individuals who work at the White House, and even if we consider a congressional investigation to be an adversarial proceeding, the only harm that could come to the White House as a result of such an investigation is political harm. As in our discussion of the common-interest doctrine, we decline to endorse the position of the White House where it is based on nothing more than political concerns.

The White House bears the burden of establishing the elements of work product immunity. *See* Restatement § 139(2). Based on the showing the White House has made here, we cannot conclude that the work product of its attorneys may be kept from the OIC.

V.

At oral argument, we raised sua sponte the possibility that we could decide the questions of law presented in this appeal without necessarily applying them to this case. After further consideration, we have concluded that our decision must be applied to the parties now before us.

In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), the Supreme Court settled one major question of the retroactivity of decisions:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit 'the substantive law to shift and spring' according to 'the particular equities of individual parties' claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at 97 (citation and alterations omitted); *see also Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) (adopting same rule for criminal cases).

The Court's recent decisions have not forced it to contend with the permissibility of "pure prospectivity," that is, the practice of announcing a new rule but applying it neither to the parties involved in the watershed case nor to others similarly situated. The Court has on occasion resorted to purely prospective decisionmaking, *see James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.) (citing cases), but language in the Court's recent opinions convinces us that purely prospective adjudication is at least unwise and most likely beyond our power. *See Harper*, 509 U.S. at 97 (citing "'basic norms of constitutional adjudication'" (quoting *Griffith*, 479 U.S. at 322)); *id.* at 106 (Scalia, J., concurring) ("prospective decisionmaking is quite incompatible with the judicial power").

The most relevant precedent also suggests that it is appropriate to apply our decision in this case. In *Trammel*, the Supreme Court considered the well-established common law privilege against adverse spousal testimony. *See Trammel*, 445 U.S. at 43-46 (describing history of privilege). The Court had specifically affirmed the vitality of the privilege in *Hawkins v. United States*, 358 U.S. 74, 77-79 (1958), and the Proposed Rules of Evidence had recommended continuation of the privilege. *See* Proposed Fed. R. Evid. 505(a), 56 F.R.D. at 244. Nevertheless, the district court permitted Trammel's wife to testify against him over his objection, and the court of appeals affirmed his conviction. *See Trammel*, 445 U.S. at 42-43. The Supreme Court, by a unanimous vote, took the privilege away from the defendant-spouse, leaving it to the witness-spouse to decide whether to testify. *See id.* at 53. Despite this clear overruling of its earlier precedent, the Court applied the new rule to Trammel's case and affirmed his conviction. We believe the same treatment is appropriate in this case, which involves no such drastic change in the law; in fact, because this

is a case of first impression, our decision involves no change in the law at all.

In short, a purely prospective decision is little more--perhaps nothing more--than an advisory opinion. We decline to render such an opinion and conclude that our holding necessarily applies to the White House in this case.

VI.

To sum up, we hold that neither the attorney-client privilege nor the attorney work product doctrine is available to the White House in the circumstances of this case. Accordingly, the order of the District Court is reversed, and the case is remanded for the entry of an order granting the OIC's motion to compel.

KOPF, District Judge, dissenting.

I. Introduction

I respectfully dissent. This case involves the institutional capacity of the President of the United States to function with the advice of legal counsel. The clarity of this point is made evident by the subpoena, which demands notes taken by "the Office of Counsel to the President." (Subpoena Rider at 1.) Because of this important fact, I would apply *United States v. Nixon*, 418 U.S. 683 (1974), rather than the position urged by the Independent Counsel (IC). I would not follow *Nixon* for some purposes, and disregard it for others.

Federal Rule of Evidence 501 requires that we decide whether federal common law extends the attorney-client privilege to the White House. The White House possesses an attorney-client privilege under proposed Federal Rule of Evidence 503, sometimes called Supreme Court Standard 503 (Rule 503). Rule 503 accurately states the federal common law regarding the attorney-client privilege, as this court has

consistently stated in the past. The following portion of Rule 503 is pertinent to the dispute here:

> (a) Definitions. As used in this rule:
>
> (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
>
> (2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
>
> (3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.
>
> (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest , or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Rule 503, *reprinted in* 56 F.R.D. 183, 235-36 (1972).

I disagree with the IC that the Rule does not mean what it states, and we should act as if did not exist. There is no reason to deny the well-recognized principle that the government, including the White House, is legitimately entitled to the attorney-client privilege (and the work-product doctrine). The White House, no less than a state government or a corporation, is entitled to the privilege in all types of cases, including criminal cases, so that the White House can comply with the law. The privilege advances the public interest by assuring that the White House will receive well-founded, fact-specific legal advice based upon candid responses from White House officials. Accordingly, I disagree with the IC' s position that the White House lacks the attorney-client privilege.

However, the Supreme Court' s decision in *Nixon* persuades me that the White House privilege gives way to a grand jury subpoena duces tecum issued under the direction of the IC *provided* the procedural protections of *Nixon* have been observed. Unlike the IC, I believe *Nixon* overcomes, but does not erase, the privilege. *Nixon* requires us to conclude that the President's general need for confidentiality, expressed here by the attorney-client privilege, is overshadowed by the grand jury's general need for evidence of the truth. Still, *Nixon* does not, as the IC urges and the majority finds, permit us to assume that the White House lacks the privilege in the first instance.

In particular, I would require, as *Nixon* did in the context of a trial subpoena, that before documents are revealed to the grand jury:

> (1) the special prosecutor must make an initial threshold showing before the district court that the documents are: (a) specifically needed; (b) relevant; and (c) admissible;
>
> (2) assuming such a showing has been made, the documents are first delivered to the district judge, who will examine the documents in chambers, to decide if in fact the documents are relevant and admissible, and irrelevant documents will be returned under seal to the White House.

Id. at 700-02, 713-16.

I do not agree that a grand jury subpoena directed at the White House is *more* important than the trial subpoena directed at the White House in *Nixon*. The President's justifiable need for confidentiality is, as *Nixon* recognized, ever present no matter what other governmental interests are asserted by a prosecutor. The public purpose served by a grand jury is no more important than the public purpose served by a criminal trial. Thus, I disagree with the court's failure to require the IC to make the same type of showing on a motion to compel a response to a grand jury subpoena directed at the White House as would be required by *Nixon* for a trial subpoena.

Furthermore, because Mrs. Clinton also has an attorney-client privilege in her personal capacity, her privilege, implemented in this case by the "common interest" part of the rule, should be considered a complete defense to the grand jury subpoena issued to the White House. I have two reasons for this belief: (1) unlike the White House, Mrs. Clinton has various constitutional rights that are implicated by intercepting her privileged communications without warning and then revealing those communications to a prosecutor; and (2) *Nixon* did not attempt to balance the "public interest" against the "individual interest" and thus cannot serve as precedent for the dispute between the IC and Mrs. Clinton in her personal capacity.

Finally, because we should now declare for the first time that *Nixon* overcomes the White House privilege if a proper showing is made, Mrs. Clinton would consult with White House lawyers at her peril in the future. She would be informed from our opinion that such consultations might no longer be protected since the other party to her conversations (the White House and its lawyers) could be obligated to respond to a grand jury subpoena if the prosecutor made the showing required by *Nixon*. Consequently, in the future, and to the extent of a grand jury subpoena, any such communications

could not legally be "intended" by Mrs. Clinton as "confidential" under Rule 503(a)(4) because she would know and understand that her communications could be "disclosed to third persons."

Accordingly, I would affirm the district court's properly cautious decision refusing to enforce the subpoena. Yet I would make it clear that the White House attorney-client privilege gives way to a grand jury subpoena issued under the supervision of the IC if the procedural protections afforded the White House by *Nixon* are satisfied. A detailed explanation of these views is set forth below.

II. The White House

Like any other client, the White House has an attorney-client privilege in all types of cases. The question, and it is a very difficult one, is whether that privilege should prevail in this first-of-a-kind case. Subject to certain procedural protections, fidelity to *Nixon* requires that the White House privilege give way to the limited extent of a subpoena duces tecum issued by a federal grand jury acting at the direction of the IC. We should not, however, act as if the White House lacks the privilege or allow the IC to make an end run around the procedural protections afforded the White House by *Nixon*.

A. The White House and the Attorney-Client Privilege

We must ask two questions when determining whether the White House has an attorney-client privilege: (1) what standard applies and (2) has the White House satisfied that standard?

1. The Common Law and Rule 503

Federal Rule of Evidence 501 provides that "the privilege of a . . . person" or "government" "shall be governed by principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." It is our task to find the common law of attorney-client privilege.

Promulgated by the Supreme Court in November 1972, Rule 503(a)(1) plainly grants the White House the attorney-client privilege. The rule extends the privilege to "organization[s] or entit[ies], either public or private."

The subpoena was directed to the "White House." Thus, the IC recognized the "White House" as a discrete governmental organization or entity protected by the unambiguous language of Rule 503(a)(1). Consequently, if Rule 503 applies, the White House has the privilege it asserts.

To avoid Rule 503, it is argued that the rule does not apply because (1) Congress did not enact it; (2) it does not apply to criminal cases involving governmental entities; (3) the public interest is not served when a governmental entity asserts the privilege. None of these arguments suggest a valid reason for failing to follow the plain words of the Rule.

a. Rule 503 Reflects the Common Law Despite Congressional Action

Congress did not enact Rule 503 and various other privilege rules. Instead, Congress adopted a general rule (Rule 501) allowing the federal courts to establish privilege in light of the common law. *See Jaffee v. Redmond*, 116 S. Ct 1923, 1927 n.7, 1930 (1996) (citing proposed Rule 504 regarding psychotherapist-patient privilege in support of the Court's adoption, under Rule 501, of such a privilege).

Our precedents correctly state, however, that Rule 503 is "'an accurate definition of the federal common law of attorney-client privilege.'" *In Re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (quoting 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[02], at 503-17 (1975)) (applying rule and finding the privilege applied to partnership and prevented disclosure of communication between a consultant of partnership and attorney); *United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (stating "courts have relied upon [Rule 503] as an accurate definition of the federal

common law of attorney-client privilege" and affirming order quashing subpoena for taped statements made by client at direction of a lawyer); *Citibank. N.A. v. Andros*, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981) (stating rule is "a source for defining the federal common law of attorney-client privilege" and holding that privilege belonged to trustee of a corporation and could be waived by him).

Other circuits have come to the same conclusion. See, e.g., *Tennenbaum. v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (the court would look to Rule 503 since the proposed rule, although not adopted, was a convenient comprehensive guide to existing federal law of privilege) (citations omitted); *United States v. Moscony*, 927 F.2d 742, 751 (3rd Cir.), *cert. denied*, 501 U.S. 1211 (1991) (Supreme Court Standard 503, though not promulgated, is a restatement of the common law of attorney-client privilege applied in the federal courts before the adoption of the federal rules) (citations omitted); *United States v. (Under Seal)*, 748 F.2d 871, 874 n. 5 (4th Cir. 1984) (Rule 503 provides a comprehensive guide to the federal common law of attorney-client privilege) (citations omitted).

Importantly, the Supreme Court proposed the Rule. This court, and others, frequently refers to the Rule as "Supreme Court Standard 503." *See, e.g., In Re Bieter Co.*, 16 F.3d at 935; *United States v. Spector*, 793 F.2d at 938. When searching for the common law, we should not disregard the fact that the Supreme Court approved the Rule.

Distinguished commentators have also reached the same conclusion: "Standard 503 is a restatement of the traditional common law attorney-client privilege that had been applied in the federal courts prior to the adoption of the federal rules. Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the courts." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[02], at 503-19 (1996) (citing, among other cases, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 605

n.1 (8th Cir. 1977)) (footnotes omitted). *See also Restatement of the Law (Third) Governing Lawyers* § 124 & Rep.'s n. at 412 (Proposed Official Draft 1996)[1] *available in* WL database "REST-LGOV" (citing Rule 503 (a) (1) as support for the proposition that the "prevailing rule" is that the government has the same privilege as its private counterparts).

Therefore, the failure of Congress to adopt Rule 503 is not significant. The Rule is an accurate definition of the federal common law of attorney-client privilege despite the lack of Congressional approval.

b. Rule 503 Makes No Distinction for Criminal Cases

Contrary to the second argument for not applying it, the plain words of Rule 503 make no distinction for criminal cases. I find no reason to make an exception for special prosecutors who have a dispute with the White House. To the extent it is suggested that the privilege has never

been extended to a federal governmental entity in a criminal case brought by another federal governmental entity, the point is meaningless. The reason there are no such cases is obvious: intra-governmental disputes in the federal criminal arena seldom arise, regardless of whether the attorney-client privilege is involved.

Further, there is certainly no case which denies the privilege in matters such as this. In fact, the only remotely relevant federal case implicitly acknowledged the existence of the privilege for a state governmental entity in a federal criminal investigation. *In Re Grand Jury Subpoena*, 886 F.2d 135, 137-38 (6th Cir. 1989) ("city council" was a "client" for the purpose of attorney-client privilege when a federal grand

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[1] This draft received tentative approval in May, 1996. *American Law Institute Nears Finish Line on Lawyer Ethics, Product Liability Projects*, 64 U.S.L.W. 2739 (May 28, 1996).

jury sought documents from the City of Detroit and the city asserted the privilege).

Most importantly, there is no reason to pretend the privilege does not exist simply because the White House asserts it during a criminal investigation. As will be discussed in more detail later, *Nixon* did not take this approach. Rather, as the *Nixon* court made clear, the appropriate approach is to balance the governmental privilege asserted by the White House (whether it be the attorney-client privilege or some other privilege) against the competing governmental interest asserted by the IC, the ultimate goal being to promote the "public interest." 418 U.S. at 707-13.

Consequently, I reject the argument that it is proper to ignore the attorney-client privilege because the IC has the power to attach the label "criminal" to this dispute.

c. A White House Privilege Promotes the Public Interest

Recognition of the privilege for governmental entities, particularly the White House, advances the public interest.

Since Rule 503 was proposed, the federal courts have consistently recognized that governmental entities have the attorney-client privilege. *See, e.g., Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 & n.20 (D.C. Cir. 1977) (recognizing privilege in Freedom Of Information Act (FOIA) case and stating that in other contexts "there are decisions which have applied [the privilege] to deny a discovery request directed toward a government") (citations omitted); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 & n.6 (E.D. Pa. 1980) (recognizing privilege in a suit for a tax refund and stating that "[c]ourts generally have accepted that attorney-client privilege applies in governmental context") (collecting federal cases dating from and after 1963) (citations omitted).

While it is true that none of these cases dealt with the precise issue in this case, one cannot ignore the fact that the

courts have consistently held that the public interest is furthered by extending the privilege to governmental entities. As a result, we should be very skeptical of the IC's argument that requires us to ignore a general principle.

Since at least 1965, Congress has affirmatively recognized the government's need to be protected by the attorney-client privilege regarding the production of documents. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 154 (1975) (applying 5 U.S.C. § 552 (b) (5)) (FOIA case). The Court observed that the legislative history, authored in 1965, declared the exemption "'would include . . .documents which would come within the attorney-client privilege if applied to private parties.'" *Id.* (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Consequently, believing that Congress would find recognition of the privilege to be a surprise is impossible.

The proposed *Restatement of the Law (Third) Governing Lawyers* also recognizes that the attorney-client privilege "extends to a communication of a governmental organization" and to "an individual officer, employee, or other agent of a governmental organization . . . ." *Restatement of the Law (Third) Governing Lawyers* § 124, at 408. This section "*states the generally prevailing rule that governmental agencies and agents enjoy the same privilege as non-governmental counterparts.*" *Id.* cmt. b at 409 & Rep.'s n. at 412-14 (collecting federal and state cases dating from and after 1942) (citations omitted) (emphasis added). The rationale is obvious: "The privilege aids government entities and officers in obtaining legal advice founded on a complete and accurate factual picture. Communications from such agents should be correspondingly privileged." *Id.* at 408. The *Restatement's* reasoned conclusion, coming nearly twenty-five years after the Supreme Court proposed Rule 503, lends added support for the

finding that a governmental attorney-client privilege advances, rather than detracts from, the public interest.[2]

Although the IC now holds the opposite view, the United States has previously and consistently taken the position that governmental entities, particularly the President and his advisers, are protected by the attorney-client privilege. One prior expression of the views of the United States regarding the attorney-client privilege, the President, and his advisers is particularly thoughtful.

In a 1982 opinion issued to the Attorney General of the United States, Assistant Attorney General Theodore B. Olson, of the Office of Legal Counsel (OLC), advised the Attorney General that "[a]lthough the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector." *Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982) (citations omitted), reprinted in Appellee's App. [hereinafter *Att'y Gen.'s Mem.*].

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[2] Even those commentators who question whether the attorney-client privilege was extended to governments at "common law" agree "most" courts have recognized that governmental entities are entitled to the privilege. 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, § 5475, at 125 (1986). These commentators likewise predict the courts will continue to recognize that the privilege extends to governmental entities. *Id.* at 128. ("[I]t seems likely that some form of privilege for governmental clients will be recognized by federal courts applying Rule 501.") (citations omitted.)

OLC found convincing support for its position in *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981) (applying attorney-client privilege in corporate context, rejecting "control group test," and holding that detailed information provided to corporate counsel by corporate managers, who were not necessarily policy makers, regarding questionable payments by corporation was protected from an IRS document summons under the attorney-client privilege[3]). *Att'y Gen.'s Mem.* at 495-96.

According to OLC, the President, no less than the Upjohn corporation, required the attorney-client privilege so he could comply with the law by insuring that subordinates talked candidly with counsel. *Id.* OLC reasoned:

> [I]t is likely that, in most instances, the 'client' in the context of communications between the President and the Attorney General, and their respective aides, would include the broad scope of White House Advisers in the Office of the President. The 'functional' analysis suggested by *Upjohn* focuses on whether the privilege would encourage the communication of relevant and helpful information from advisors most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended courses of action.

Id. at 496.

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[3] In addition, the Court held that to the extent they reflected the mental impressions of counsel, the documents were also protected from disclosure by the "work product" doctrine. *Id.* at 401-02. To the extent the notes in this case are "work product," they too would be protected under the "work product" doctrine of *Upjohn*.

If this court has to make a choice when discovering the common law as applied to the White House, we ought to choose the analysis contained in the *Memorandum for the Attorney General*. I am particularly opposed to the adoption of the position urged by the IC because it is contrary to the long-standing policy of the Department of Justice.

To avoid *Upjohn*, it is argued that the White House is different from a corporation in three distinguishing respects. It is argued that the White House cannot be prosecuted for a crime. The IC also argues that White House lawyers, unlike counsel for corporations, have a statutory responsibility to report crimes. Finally, it is claimed that the White House, as opposed to a corporation, has a duty to further honest government.

Since the *Upjohn* decision was not based upon the fact that a corporation could be prosecuted for a crime, it is an irrelevancy to distinguish *Upjohn* on that basis. In *Upjohn*, the government pursued the exact opposite of the IC's argument here that the privilege does not apply because the White House cannot be prosecuted for a crime. In *Upjohn* the government argued that because corporations were subject to criminal liability corporations had a sufficient incentive to comply with the law and, therefore, corporations did not need the attorney-client privilege because they would seek legal advice in any event. The Court rejected this argument in a footnote. 449 U.S. at 393 n.2. Simply put, *Upjohn* did not turn on the presence or absence of criminal liability. *Id.*

More to the point, *Upjohn* reasoned that corporate policy makers legitimately need their lawyers to know the facts in order for the corporation to comply with the law, and, absent the corporate attorney-client privilege, the fact-finding process would be impaired along with the corporation's ability to conform its conduct to the law after receiving fact-based legal advice. *Id.* at 389-97. Likewise, the Court reasoned that even minor corporate employees needed candid legal advice to

insure that the corporation complied with the law, and absent the privilege such advice would not likely be forthcoming. *Id.* The same reasoning applies to the White House.

I also reject the related argument that we can distinguish *Upjohn* on the basis that a White House official who fears he or she may have violated the criminal law should speak to a private attorney, not a government lawyer. This argument misses the point for extending the privilege to organizations.

The organizational attorney-client privilege, be it asserted by the White House or Upjohn, is intended to encourage officials, who may be fearful of losing their jobs, their reputations, their privacy, or their liberty, to tell the organization the raw truth so it can comply with the law. The privilege is also premised upon the reasonable belief that no-nonsense legal advice generally depends upon confidentiality, and corporations need such advice if they are to comply with the law. In this regard, there is no reason to presume that the White House is different from Upjohn.

The argument that government lawyers, unlike corporate counsel, are required by statute to report crimes and this fact distinguishes White House counsel from corporate counsel, is built upon a false premise. While it is true that 28 U.S.C. § 535(b) requires governmental employees to report crimes, the Department of Justice has properly reasoned that the statute must be interpreted in conformity with, not in opposition to, the attorney-client privilege. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* at 2 (Nov. 30, 1976) ("[N]o information the employee conveyed to the Assistant U.S. Attorney in connection with the civil action may be used by the Department to prosecute the employee; nor may it be turned over to anyone else, such as the employing agency, for use against him."), *reprinted in* Appellee's App. Assistant Attorney General Scalia

stated: "Given the absence of any discussion of the subject in the legislative history [regarding section 535(b)], it would in our view be inappropriate to infer a congressional purpose to breach the *universally recognized and longstanding confidentiality of the attorney-client privilege.*" *Id.* at 6-7 (emphasis added).

The Department of Justice has consistently followed this advice. For example, in 1985 OLC stated that the "principal reason for our conclusion that the attorney-client privilege overrides § 535(b) is that confidentiality of communications between client and lawyer is essential if Department attorneys are to be able to provide adequate legal representation." Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee* at 6 (March 29, 1985) (citing prior opinions of OLC dating from 1978), *reprinted in* Appellee's App.

Lastly, the argument is advanced that the White House, but not a corporation, has a public duty to seek honest government. Therefore, it is argued, the attorney-client privilege should be ignored because it impedes an honest government's search for the truth. The "good government" argument is no basis for denying the privilege to the White House.

To recognize that the White House has an attorney-client privilege is not to adopt a "bad government" position though the existence of such a privilege may inhibit the IC from obtaining all the information he might like by making a demand upon the White House. As *Upjohn* recognized, the attorney-client privilege serves the public interest by promoting the "valuable efforts of corporate counsel to ensure their client's compliance with the law," especially in those areas of the law that are "hardly . . . instinctive." 449 U.S. at 392. The same thing can be said for the White House, *especially* because it has a duty to promote honest government. We should not premise

our decision upon the assumption that the IC is the *only* guardian of just government.

In short, I reject the argument that the attorney-client privilege in the hands of the White House is antithetical to the interests of justice, though I acknowledge that the privilege may impede the work of the IC. When a prosecutor asks the court for help in invading the confidences of the President, the proper way to address the "public interest" question is not to pretend that the White House lacks the attorney-client privilege. On the contrary, the court should carefully balance, as *Nixon* did, the competing governmental interests, subject to the procedural protections that *Nixon* carefully set forth.

e. Summary

Rule 503 is an accurate statement of the common law. The rule is therefore definitive, and we should apply it.

2. Application of Rule 503

Having determined that Rule 503 is definitive and that the governmental attorney-client privilege set forth in Rule 503 generally promotes the public interest when applied to the White House, we should apply the rule to this case. The White House possesses the attorney-client privilege because all the prerequisites for application of Rule 503(b)(1) have been established.

a. White House As "Client" and Mrs. Clinton As "Representative"

Under Rule 503(a)(1), as applied to the evidence here, there is a "client." The "client" is the White House, acting through Mrs. Clinton in her representative role as First Lady. As noted earlier, Rule 503 explicitly extends the attorney-client privilege to "organizations" or "entities" that are "public" in nature. The rule also explicitly protects communications involving a "representative" of a client. Rule 503(b)(1)

protects a "client's" discussions "between himself or his representative and his lawyer."

Mrs. Clinton is surely a "representative" of the White House. To the extent the IC argues that Mrs. Clinton as First Lady should not be considered a "representative" of the White House, I reject the argument as factually and legally unsound.

Factually, the district court found that Mrs. Clinton, "like other First Ladies before her, has a widely recognized role as an advisor to the President and is generally considered to be a member of the President's inner circle." Slip. Op. at 10. The district court's finding is not clearly wrong.

Legally, "*Congress* itself *has* recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904 (D.C. Cir. 1993) (holding Mrs. Clinton was a "full-time officer or employee of federal government," relying on and quoting 3 U.S.C. § 105(e) (emphasis in original)). See also, *Att'y Gen.'s Mem.*, 6 Op. Off. Legal Counsel at 496 (attorney-client privilege covers the "broad scope of White House advisers in the office of the President").

As a "member of the President's inner circle" of advisers, Mrs. Clinton is precisely the type of organizational "representative" the attorney-client privilege would ordinarily cover. *See, e.g., Upjohn Co. v. United States*, 449 U.S. at 387-95; *In Re Bieter Co.*, 16 F.3d at 935-40 (granting a writ of mandamus and sustaining invocation of attorney-client privilege by partnership; applying *Upjohn* to a person who, although not an employee of the partnership, was a consultant; reaching this result because: (1) communications were made for the purpose of seeking legal advice; (2) it was reasonable to assume that client's principal directed consultant's communication with counsel; (3) it was reasonable to assume that client's principal directed the communication be made for the purpose of securing legal advice; (4) subject matter of

discussion was within scope of the consultant's duties as evidenced by what consultant did; and (5) communications were held in confidence).

b. To Or From A Lawyer

It is undisputed that there were communications to or from White House counsel to or from the First Lady. *See* Rule 503 (a) (2) & (b) (1). *Upjohn* makes clear that the privilege goes both ways, that is, the privilege protects advice from a lawyer to a client, and it also protects statements made by a client to a lawyer for the purpose of informing the lawyer so the lawyer may give fact-specific advice to the client. 449 U.S. at 389-91. Thus, communications from the First Lady to White House counsel are protected just the same as communications to the First Lady from White House counsel.

c. Confidential Communication

Given the undisputed facts presented in the declaration of White House counsel, (IC App. at 27 ¶ 16, 29-30 ¶¶ 20-21), as well as the facts presented in the declaration of Mrs. Clinton's personal lawyer, (IC App. at 35-37 ¶¶ 5-7), the communications recorded in the sought-after notes were intended to be "confidential" within the meaning of Rule 503 (a) (4). These communications were not intended to be revealed to third parties, and they were not. Furthermore, recognizing (1) the explicit language of Rule 503, (2) the wide acceptance of a governmental attorney-client privilege by the federal courts, thoughtful commentators and the Department of Justice, (3) the Supreme Court's opinion in *Upjohn*, and (4) the fact that *Nixon* did not rule on a White House assertion of the attorney-client privilege, there was no reason for the White House, Mrs. Clinton, or the lawyers to doubt that the communications would be held in confidence.

The presence of Mrs. Clinton's personal lawyer does not change the result. As will be discussed more fully later, Mrs. Clinton, in her personal capacity, and the White House, as an

entity represented by the First Lady in her official capacity, shared a legal "matter of common interest." Rule 503(b)(3) prevents disclosure of communications "by [a client] or his lawyer to a lawyer representing another in a matter of common interest."

Among other things, both parties (the White House and Mrs. Clinton personally) needed to respond carefully and candidly to the IC; therefore, both required the advice of legal counsel. As a result, Rule 503 (b) (3) explicitly protects communications between White House counsel and the First Lady even though a lawyer (Mrs. Clinton's personal lawyer) for another party (Mrs. Clinton in her personal capacity) was present.

d. Facilitating the Rendition of Legal Services

Finally, the undisputed evidence establishes that the communications were made for the purpose of "facilitating the rendition of professional legal services" to the White House as the "client" within the meaning of Rule 503(b)(1).

The subject of the meeting that generated the first set of notes pertained to the death of a senior White House official (Vincent W. Foster) and Mrs. Clinton's activities immediately afterward. (IC App. at 27 ¶ 16.) The subject of the meeting that generated the second set of notes was the discovery of billing records involving Mrs. Clinton which were found at the White House and turned over to the IC as relevant evidence in his investigation. (IC App. at 28-30 ¶¶ 18-21, 35-37 ¶¶ 5-7.)

Both meetings, and the notes regarding them, pertained to events that directly involved the institutional functioning of the White House. It is reasonable to believe that White House counsel and Mrs. Clinton discussed her role as First Lady after the death of Mr. Foster and her role as First Lady regarding the discovery of the billing records. Moreover, the events that were the subject of these meetings between the First Lady and White House counsel are directly related to issues the IC was

authorized to investigate concerning the White House as an institution. Slip Op. at 2-3. (IC authorized to investigate death of former Deputy White House Counsel Vincent W. Foster and discovery of Rose Law Firm billing records in the White House residence.)

Under these circumstances, it is reasonable to assume that the President (or another principal at the White House) directed the First Lady's communication with White House counsel for the purpose of securing legal advice for the White House. *In Re Bieter Co.*, 16 F.3d at 938-39 (making similar assumptions in context of a partnership consultant).

Ignoring for the moment Mrs. Clinton's personal stake in the matter, the White House as a "client" had a legitimate and independent institutional reason to pursue the two conferences between its "representative" (Mrs. Clinton) and its "lawyers" (White House counsel) for the "purpose of facilitating the rendition of professional legal services to the client [the White House]." Rule 503 (b) (1). White House lawyers had a legitimate institutional need to know what the client's "representative" knew in order to advise the "client," including the client's "representative," what to do or not do. In particular, the White House had a legitimate institutional need for the advice of its lawyers so that, acting through people, including the First Lady, as it must, the White House could carefully and candidly respond to the IC.

The decision to turn over billing records to the IC, records that although discovered at the White House also involved Mrs. Clinton in her personal capacity, is proof of the White House's legitimate institutional need to have its lawyers advise and consult with the "client's representatives," including individuals such as the First Lady. On January 4, 1996, Jane C. Sherburne, special counsel to the President, learned that Ms. Carolyn Huber, a White House employee, had located in the White House residence a copy of billing records relating to the work performed by attorneys at the Rose Law firm, including

Mrs. Clinton, for Madison Guaranty. (IC App. at 28 ¶ 18.) Ms. Sherburne, in consultation with Mrs. Clinton's personal lawyer, decided that the records should be promptly turned over to the IC, the Senate Whitewater Committee, the House Banking Committee, the FDIC and the RTC, and the records were in fact turned over to those governmental bodies. (*Id.*) The production of these documents caused the IC, among others, to launch an investigation relating to the finding of the billing records. (*Id.*)

As the Supreme Court has recognized, the attorney-client privilege is extended to organizations so the people who ultimately effect the policy of an organization can comply with the law by obtaining information from subordinates and then directing those subordinates to comply with the law. *Upjohn*, 449 U.S. at 390-93. The handling of the billing records here proves why the *Upjohn* rationale for extending the attorney-client privilege to corporations, acting as they must through people, is also applicable to the White House.

e. Summary

There was (1) a communication to or from Mrs. Clinton in her role as an "inner-circle" representative of the client White House, Rule 503(a)(1) & (b)(1); (2) to or from a White House lawyer, Rule 503(a)(2); (3) intended to be confidential, Rule 503(a)(4); (4) for the purpose of seeking, obtaining, or providing legal assistance to the client White House, Rule 503(a)(4) & (b)(1). These findings establish that the White House has the attorney-client privilege it asserts. *See also In Re Bieter Co.*, 16 F.3d at 935-40.

B. Balancing the Public Interest

Assuming the White House possesses the attorney-client privilege, two issues must be resolved. First, we must decide whether the IC could ever be entitled to the notes when the White House asserts the attorney-client privilege. Second, we must address the issue of what procedural protections must be

employed to protect the White House's legitimate need for confidentiality, assuming the privilege is not an absolute bar and that production may be required under certain circumstances. Both inquiries require a careful balancing of the interests of the White House and the IC to preserve and protect the public interest that both governmental entities seek to promote.

1. *Nixon's* Balancing Test

While the White House generally has the attorney-client privilege it asserts here, this case is unprecedented. Never have the courts been confronted with (1) a motion by an independent counsel (himself a singularly unique creature under federal law) in a criminal investigation (2) to enforce a grand jury subpoena for documents directed at the White House (3) under circumstances where enforcement of the subpoena would pierce the attorney-client privilege enjoyed by the White House.

Once we decide that the White House has a privilege that the IC seeks to overcome, the only precedent that matters is *United States v. Nixon*, 418 U.S. 683. A brief summary of that case is helpful.

The *Nixon* court held that the public interest requires that presidential confidentiality be afforded the greatest possible protection consistent with the fair administration of justice. Nevertheless, the Court also held that the President was required to turn over taped conversations to the district court pursuant to a trial subpoena issued at the request of a special prosecutor under Federal Rule of Criminal Procedure 17(c), despite the President's assertion of Executive Privilege.

The special prosecutor had made a preliminary showing of specific need, relevance, and admissibility before a federal district judge. The Supreme Court suggested that such a showing was always required when the President invoked a privilege.

The Court then attempted to balance the twin concepts of "public interest" asserted by the President and the special prosecutor. The Court stated that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

As an additional precaution, the Court required the district court to conduct an *in camera* examination of the tapes after the order for production was issued, but before they were turned over to a special prosecutor. The purpose of this examination was to decide whether the tapes were actually relevant and admissible.

Now, as in *Nixon*, both the White House and the IC assert that the "public interest," warrants a finding for their particular position. As between these governmental entities, I agree that the "public interest" is the value to be preserved by our ruling. As a result, the dispute comes down to this: Is the White House's attorney-client privilege generally more important than a grand jury's criminal investigation of the White House?

At this elevated level of abstraction, *Nixon* teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth.[4] The Department of Justice has taken a similar view in the past. *See Att'y Gen.'s Mem.*, 6 Op. Off. Legal Counsel at 487-88 ("The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related to the effective performance by the coordinate branches of their constitutionally assigned functions.") (citing *Nixon*).

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[4] The same analysis justifies piercing the work product "privilege."

The White House has not articulated the specific harm to the public interest that would occur if this subpoena was enforced. *Nixon* addressed a similar issue and concluded that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications of such material is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide." *Id.* at 706. Therefore, I would find that, assuming the procedural protections afforded the White House by *Nixon* are observed, the attorney-client privilege may be invaded.[5]

This is not a conclusion to be reached lightly. The White House has a strong argument that an attorney-client privilege which is not absolute is no privilege at all. *Upjohn*, 449 U.S. at 393. Moreover, as discussed in more detail later, *Nixon* specifically recognized that the attorney-client privilege was an exception to the general rule that "the public . . . has a right to every man's evidence." 418 U.S. at 709-10.

Nevertheless, *Nixon* ultimately teaches that the number of times the President's confidences may be invaded will be few. The only time such confidences may be probed is when the procedural protections carefully articulated by *Nixon* have been satisfied. Accordingly, the attorney-client privilege, while not absolute, will retain vigor for the White House because the privilege will be overcome only infrequently and only after painstaking judicial scrutiny.

2. *Nixon's* Procedural Protections

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[5] However, as did the Supreme Court in *Nixon*, I would limit the holding to criminal investigations involving special prosecutors (and not to civil cases or congressional hearings). *Nixon*, 418 U.S. at 712 n.19.

The White House suggests the IC is on a "fishing trip." After all, the IC could simply call Mrs. Clinton to testify before the grand jury, as he has done in the past, to investigate her knowledge of the facts. Consequently, it is reasonable to ask: why does the IC need the privileged notes?

We ought to be very cautious about assuming that the IC needs to invade the White House attorney-client privilege to obtain the facts. *Upjohn* forcefully made this point:

> Here the government was free to question the employees who communicated with Thomas [corporate counsel] and outside counsel. . . . While it would probably be more convenient for the government to secure the results . . . by simply subpoenaing the . . . notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege.

449 U.S. at 396.

If we require a preliminary showing of specific need, relevance, and admissibility to a district judge as *Nixon* clearly did, 418 U.S. at 700-02, 713-14, such a requirement would (1) prevent the use of a grand jury subpoena as part of an improper "fishing expedition" and (2) insure that the White House attorney-client privilege was not lightly overturned. Fidelity to *Nixon* requires that we approve the invasion of the White House attorney-client privilege when absolutely necessary, but fidelity to *Nixon* also requires that we extend to the White House the protections that *Nixon* set forth before such an invasion takes place.

To avoid the preliminary showing requirement, the IC makes much of the fact that *Nixon* involved a trial subpoena and this case does not. The IC further points out that the preliminary showing requirement of *Nixon* was (in part) based upon Fed. R. Crim. P. 17(c) which deals with trial subpoenas. Two responses make the IC's arguments unpersuasive.

Initially, *Nixon* repeatedly cautions that the unique interests of the Presidency, not merely Rule 17(c), warrant active judicial supervision with a threshold showing of need, relevance, and admissibility. *Id.* at 702, 713-16. Quite apart from Rule 17(c), early precedent required a showing that "the Presidential material was 'essential to the justice of the [pending criminal] case.'" *Id.* at 713 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694)) (brackets in *Nixon*).

Moreover, I am unconvinced by the logic of the IC's argument. I do not believe a grand jury subpoena is *more* important than a criminal trial subpoena such that the procedures required by Nixon should be cast aside when the IC decides to cause the issuance of grand jury subpoena aimed at the White House.

Given the difference between a grand jury proceeding and a trial, the need, relevance and admissibility standard would be judged considering the nature of the proceeding. For example, treating impeachment evidence more liberally might be appropriate. *Compare Nixon*, 418 U.S. at 701. *Nixon* left these issues to the "sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues." *Id.* at 702. Nevertheless, the investigative nature of a grand jury is no reason for the wholesale disregard of the protections that *Nixon* affords the unique status of the Presidency.

Even a favorable ruling for the IC at the first stage of the proceedings would not mean that the IC would ever see the notes. Assuming that a threshold showing had been made, *Nixon* required that the notes be delivered to the district court, not to the special prosecutor. *Nixon*, 418 U.S. at 713-16. After that, the district court was required to make an *in camera* examination of the notes. *Id.*

With the notes before it,[6] the court would (1) determine whether the notes were relevant and admissible; (2) ensure that they were treated with the sensitivity any Presidential papers command; and (3) require that the irrelevant portions of the notes (if any) be promptly returned to the White House under seal. *Id.* The White House is entitled to similar protections when served with a grand jury subpoena that invades the attorney-client privilege, and I disagree with the refusal to extend such protection to the White House.

3. Threshold Showing

The White House contends the IC has not made a sufficient initial showing of specific need, relevance, and admissibility. The district court did not reach this issue. The IC does not argue that he satisfied *Nixon*. He assumes that he was not required to make such a showing. He does not brief the question of whether he made a sufficient showing. Accordingly, we need not decide for the first time on appeal whether the IC accidentally made the required showing.

III. Mrs. Clinton

Mrs. Clinton has an attorney-client privilege that protects against disclosure of the notes. However, as noted earlier, this court should also rule *for the first time* that the White House privilege must give way to a grand jury subpoena issued under the supervision of an independent counsel *if* the procedural protections of *Nixon* are satisfied. Consequently, once Mrs. Clinton has been advised by virtue of our opinion that she can no longer reasonably believe her conversations with White House counsel will be held in confidence in every circumstance, consistent with Rule 503(a) (4) Mrs. Clinton will

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[6] Although the district court could seek the help of the IC and White House counsel, it could not make a disclosure until the proper examination had been completed. *Id.* at 715 n.21.

consult with White House counsel in the future at the risk of having her communications disclosed to the grand jury.

A. Mrs. Clinton and the Attorney-Client Privilege

The IC has conceded that in her personal capacity Mrs. Clinton is entitled to the protections of the attorney-client privilege regarding discussions with her private lawyers. Slip. Op. at 12 n.5. The IC can take no other position. Rule 503(a)(1)&(b)(1).

The IC appears to argue that *Nixon* applies to Mrs. Clinton in her personal capacity. Alternatively, the IC argues that even if *Nixon* does not apply to Mrs. Clinton, she lost her personal privilege by sharing her thoughts with White House lawyers. I disagree on both counts.

1. *Nixon* Does Not Apply to Mrs. Clinton

Although it is unclear, the IC may argue not only that *Nixon* overcomes the White House privilege, but also that it justifies disallowing Mrs. Clinton's personal attorney-client privilege to the extent that there were communications shared with White House counsel. If this is the IC's contention, I am not persuaded.

Nixon specifically recognized that the attorney-client privilege was an exception to the general rule that "the public . . . has a right to every man's evidence," stating:

> [T]he Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney . . . may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law.

Id. at 709-10.

Despite *Nixon's* recognition of the transcendent value of the attorney-client privilege, it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House. Such an extension is appropriate because the *Nixon* opinion instructs that generalized governmental confidentiality privileges are on balance less important than the government's search for the truth when both governmental interests are compared with the "public interest."

It is quite a different thing to retroactively deny the protection of the attorney-client privilege to an individual like Mrs. Clinton based on the "public interest." This distinction is important because the Fifth and Sixth Amendments protect Mrs. Clinton, unlike the White House, and a violation of her attorney-client privilege may also violate her constitutional rights. *See, e.g., O'Brien v. United States*, 386 U.S. 345 (1967) (although they were not revealed to prosecutors, governmental interception of conversations between a defendant and his lawyer required vacation of conviction) (relying upon *Black v. United States*, 385 U.S. 26 (1966)). *Cf. Weatherford v. Bursey*, 429 U.S. 545, 557 (1977) (explaining and distinguishing *O'Brien* and *Black* and stating "[t]his is not a situation where the State's purpose was to learn what it could about the defendant's defense plans" by intruding "on the lawyer-client relationship . . .").

In addition, and more significantly, the dispute between the White House and the IC solely involves the "public interest," while the dispute between the IC and Mrs. Clinton pits the "public interest" against "individual liberties," constitutional and otherwise. *Nixon* did not attempt to balance "public" and "individual" interests, and we thus lack any meaningful guidance on the matter.

Given the Supreme Court's historic respect for the attorney-client privilege[7] and the *Nixon* opinion's recognition that the attorney-client privilege normally trumps the rule that "the public . . . has a right to every man's evidence," we should not expand *Nixon* beyond disputes between governmental entities such as the White House and the IC.

2. The "Common Interest" Provision Protects Mrs. Clinton

To avoid the difficulty of applying *Nixon* to Mrs. Clinton, the IC alternatively argues that even if the communications evidenced by the notes are "confidential" within the meaning of Rule 503(a)(4), Mrs. Clinton and her personal lawyers shared their thoughts with White House lawyers, and Mrs. Clinton lost her personal privilege as a result. I disagree.

The rule protects otherwise "confidential" communications made by the "[client] or his lawyer to a lawyer representing another in a matter of common interest." Rule 503(b)(3). The "common interest" provision of Rule 503 "is in accord with previous federal practice in recognizing a privilege both for inter-attorney communications and joint conferences where the client communicates to the other attorney directly." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[06], at 503-99 (footnote omitted). *Accord John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 555-56 (8th Cir. 1990) (recognizing and sustaining "joint defense" privilege as to an internal

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[7] *See, e.g., Upjohn*, 449 U.S. at 389 (stating "[t]he attorney--client privilege is the oldest of the privileges for confidential communications known to the common law"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

memorandum written by corporate general counsel that was shared with codefendants in another case), *cert. denied*, 500 U.S. 905 (1991) (citations omitted). *See also United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) (since "MCI shares common interests with the United States," MCI did not waive the work product privilege by sharing documents with the government).

The rule applies "not only if litigation is current or imminent but, consistently with the rest of the Standard, whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[06], at 503-99 (footnote omitted). Drafters of the "common interest" provision of the rule "intended the privilege to be broadly construed in multi-party situations." *Id.* at 503-100 (footnote omitted).

The evidence and the findings of the district court establish that there were two "clients," the White House, represented by Mrs. Clinton in her role as First Lady, and Mrs. Clinton personally; each "client" was in turn represented by separate lawyers regarding matters of "common interest." Consider again the apparent joint decision of the White House and Mrs. Clinton to turn over to the IC the billing records found at the White House. As a categorical matter, the "common interest" provision of Rule 503(b)(3) plainly applies to Mrs. Clinton and the White House because both legitimately needed the advice of separate lawyers in order to carefully and candidly respond to the IC, among others.

The IC argues that the White House does not have the attorney-client privilege, or that if it does, *Nixon* overcomes the privilege and Mrs. Clinton cannot personally claim that the "common interest" rule protects her communications. The IC asserts that Mrs. Clinton loses the protection of the attorney-client privilege once the White House does. This argument fails for two reasons.

As demonstrated earlier, the White House has the attorney-client privilege. Since the White House has always possessed the privilege, the IC cannot properly argue that Mrs. Clinton loses the "common interest" protection because the White House lacked the attorney-client privilege in the first place. The White House had the privilege then and has it now. *Nixon* may overcome, but it does not erase, the White House privilege.

Next, I agree, as indicated earlier, that, by extension of the *Nixon* reasoning, the White House attorney-client privilege must give way under certain very limited circumstances. However, a precedent making extension of *Nixon* to the White House's attorney-client claim does not justify denying Mrs. Clinton the protection of her personal attorney-client privilege safeguarded by the "common interest" provisions of the rule.

The IC has cited no case, nor have I found one, remotely suggesting that a party otherwise protected by the "common interest" provision of the attorney-client privilege loses that protection because a court determines after the fact *for the first time* that the *other party's* attorney-client privilege must, on balance, give way. We have pointedly recognized that it is "*fundamental* that the 'joint defense privilege cannot be waived without the consent of all parties to the defense.'" *John Morrell & Co.*, 913 F.2d at 556 (citation omitted) (emphasis added). Mrs. Clinton, not this court retroactively applying a first time ruling regarding the White House, must waive the privilege before the grand jury may examine the notes the IC seeks.

B. Mrs. Clinton, the White House, and the Future

Rule 503(a)(4) states that a "communication is 'confidential' if not intended to be disclosed to third persons . . . ." The committee notes state that "intent is inferable from the circumstances." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503(a)(4)[01], at 503-39. *See* 56 F.R.D. 238 advisory committee's note.

Once aware by virtue of our opinion that her conversations with White House counsel may be disclosed to the grand jury because the White House may be obligated to respond to a subpoena under certain limited conditions, if Mrs. Clinton continues to have such conversations in the future she can no longer "intend" for the privilege to protect these conversations from a grand jury subpoena. *See, e.g.*, 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503(a)(4)[01], at 503-39 & n. 2 (citing, among other cases, *Hollings v. Powell*, 773 F.2d 191, 196-97 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) (where mayor later testified to conversations with city attorney in a suit brought against mayor and city, the conversation was not intended to be confidential and the privilege was waived)).

IV. Conclusion

As between the IC and the White House, we must faithfully apply the *Nixon* decision because there is insufficient reason to distinguish that case from this one. As between the IC and Mrs. Clinton, we should understand the limits of the *Nixon* decision, and respect the fact that we are dealing with the rights of an individual. I would affirm the district court's prudent refusal to enforce the subpoena.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	* * * * * * * * *	No. GO-96-3 FILED UNDER SEAL

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of Independent Counsel Kenneth W. Starr for an order compelling production of two documents called for by grand jury subpoena duces tecum #2006 to the White House. The documents at issue consist of two sets of notes: one set taken by Associate White House Counsel Miriam R. Nemetz on July 11, 1995, at a meeting with First Lady Hillary Rodham Clinton, Special White House Counsel Jane C. Sherburne, and David E. Kendall, a private attorney representing the President and Mrs. Clinton in their personal capacities on "Whitewater" matters (the "Nemetz notes") ; and the second set taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996 (the "Sherburne notes"). The White House and Mrs. Clinton have each filed a pleading in opposition to the Independent Counsel's motion and the Independent Counsel has filed a reply to their pleadings. The court held an *in camera* hearing on this matter on the afternoon of October 28, 1996, and afterwards directed that supplemental briefs be filed with respect to the issues raised at the hearing. Having carefully considered the pleadings of the parties and the evidence adduced during the hearing, the Court finds that the

Independent Counsel's motion to compel should be and hereby is denied.

I. *Background*

On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia appointed Kenneth W. Starr as Independent Counsel to conduct an investigation into the matter known as "Whitewater." The court appointed Mr. Starr pursuant to a request by Attorney General Janet Reno following Congress' reenactment of the Independent Counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-99. The court conferred upon Mr. Starr

> full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the (statute] whether any individuals or entities have committed a violation of any federal criminal law ... relating in any way to James B. McDougall's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re: Madison Guaranty Savings & Loan Ass'n, Div. No. 94-1, slip op. at 1-2 (D.C. Cir. Sp. Div. August 5, 1994). The court additionally conferred upon Mr. Starr "prosecutorial jurisdiction to fully investigate and prosecute the subject matter . . . as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. *Id.* at 3.

Although the Independent Counsel's investigation initially focused on events that occurred in Arkansas prior to President

Clinton assuming office, it has since grown to encompass a number of matters involving conduct by White House officials. These matters include the May 1993 firing of employees of the White House Travel Office, the circumstances surrounding the death of former Deputy White House Counsel Vincent W. Foster, Jr., on July 20, 1993, and the subsequent handling of documents in his office; work performed by the Rose Law Firm for Madison Guaranty Savings & Loan while Mrs. Clinton was a partner in the firm; the January 1996 discovery of Rose Law Firm billing records in the White House residence; contacts between the White House and Treasury Department officials in 1993 and 1994 regarding criminal referrals potentially relating to Madison and Whitewater; and the handling of FBI background investigation files obtained by the White House in 1993.

Most of the matters being investigated by the Independent Counsel have also been the subject of investigations by various congressional committees in both houses of Congress. In fact, at the time of the meetings at issue in this case, there was a considerable amount of legal activity taking place with respect to Whitewater related matters. There were investigations in progress by the Independent Counsel, the Special Committee to Investigate Whitewater Development Corporation and Related Matters (the "Senate Whitewater Committee"), the House Committee on Banking and Financial Services, the House Committee on Government Reform and Oversight, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation. In addition, several White House officials had given or were about to give testimony to congressional committees and to a grand jury sitting in the District of Columbia. Various document subpoenas had also been issued to the White House. It was in this environment of

investigations and legal proceedings that the meetings in question took place.[1]

The meeting on July 11, 1995, concerned Mrs. Clinton's activities in the days immediately following the death of Deputy White House Counsel Vincent Foster. Mr. Kendall, a partner in the Washington, D.C., law firm of Williams & Connolly, states that on this day he met with Mrs. Clinton privately in the white House residence in the course of his representation of the President and Mrs. Clinton for the purpose of a legal consultation and to give legal advice. Late in this meeting, he was joined for the same purpose by Ms. Sherburne, the special White House counsel with responsibility for managing the White House response to the investigations of Whitewater matters, and Ms. Nemetz, who works under the direction of Ms. Sherburne. Ms. Sherburne and Ms. Nemetz were involved in gathering and analyzing the facts relevant to the matters under investigation and in responding to document requests from the Senate Whitewater Committee.[2] It was at this meeting that the Nemetz notes were created.

The meetings on January 26, 1996, concerned the January 1996 discovery of a copy of Rose Law Firm billing records in

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[1] The Independent Counsel does not dispute any of the assertions regarding the circumstances surrounding the meetings at issue here, and for purposes of today's decision, the Court assumes those assertions to be true.

[2] Hearings before the Senate Whitewater Committee on the Foster documents handling matter were scheduled to begin on July 18, 1995. In addition, the Independent Counsel had informed the White House that this matter would be discussed at a deposition scheduled for July 22, 1995.

the White House residence.[3] Mrs. Clinton had that same day testified pursuant to a subpoena about the discovery of these billing records before a grand Jury sitting in the District of Columbia, Mrs. Clinton was "debriefed" and counselled by her personal and official counsel in a private room at the United States Courthouse during breaks in her testimony and in the White House residence at the conclusion of her testimony. According to Mr. Kendall, these were confidential legal consultations during an ongoing representation for the purpose of giving legal advice. Present during the consultations at the Courthouse were White House Counsel John M. Quinn, Ms. Sherburne, Mr. Kendall, and Nicole K. Seligman, a partner with Mr. Kendall in the law firm of Williams & Connolly. Present during the consultations at the White House residence at the conclusion of Mrs. Clinton's testimony were Ms. Sherburne, Mr. Kendall, and Ms. Seligman. It was during these consultations at both the Courthouse and the White House residence that the Sherburne notes were created.

On June 21, 1996, grand jury subpoena duces tecum #2006 was directed to the White House. This subpoena required production of notes of interviews and meetings with Mrs. Clinton and White House officials on subjects including Madison, Whitewater, Capital Management Services, Inc., James B. McDougal, David L. Hale, and Vincent Foster. The White House identified nine sets of notes responsive to the subpoena, including the Nemetz and Sherburne notes. Although several matters regarding production of documents

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[3] These billing records were the subject of a May 1994 grand jury subpoena to Mrs. Clinton from a grand jury sitting in the Eastern District of Arkansas. White House aide Carolyn Huber testified before the Senate Whitewater Committee that she found the records on the third floor of the residence of the White House in July or August of 1995 and, not realizing what they were, placed them in a box in her East Wing office where they were discovered in January 1996.

had been resolved without judicial intervention, the White House refused production with respect to the Nemetz and Sherburne notes, asserting executive privilege, attorney-client privilege (both official and personal), and the work product doctrine as bases for withholding their production. The Independent Counsel thereupon filed the motion to compel now before the Court.[4]

II. *Discussion*

The White House and Mrs. Clinton argue that the Nemetz and Sherburne notes reflect communications between Mrs. Clinton, lawyers representing the Office of the President (of which the First Lady is a part), and lawyers representing Mrs. Clinton in her personal capacity for the purpose of providing legal advice to their respective clients. Thus, it is argued, these notes are fully protected against adversarial examination by the attorney-client privilege and the work product doctrine. The Independent Counsel does not question the purpose of the meetings, but rather argues that a federal government entity may not assert the attorney-client privilege and work product doctrine in response to a federal grand jury subpoena. Whatever the resolution of that issue, this Court concludes that the White House and Mrs. Clinton had a genuine and reasonable belief that her communications with personal and

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[4] Because the White House had indicated in correspondence with the Independent Counsel that one of the bases for withholding production of the Nemetz and Sherburne notes was executive privilege, the Independent Counsel extensively briefed this issue in his motion to compel. However, the White House stated in its pleadings in response to the Independent Counsel's motion and at the October 28 hearing that the President has chosen not to invoke executive privilege as a basis for withholding production of the notes. The Court therefore will not address that issue.

White House lawyers were confidential and for the purpose of receiving legal advice and that the Nemetz and Sherburne notes were taken in anticipation of litigation. These notes are therefore protected from disclosure to the grand jury by the attorney-client privilege and the work product doctrine.

A. *Attorney-Client Privilege*

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The privilege exists "to encourage full and frank communications between attorneys and their clients" and "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 389-91. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.* at 389. *See also Jaffee v. Redmond,* 116 S.Ct. 1923, 1929 (1996). The prerequisites for a claim of privilege are found in proposed Federal Rule of Evidence 503, which is also known as Supreme Court Standard 503. Although not enacted by Congress, courts have relied on this rule "as an accurate definition of the federal common law of attorney-client privilege . . . ." *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994). The rule provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or

between the client and a representative of the client, or (5) between lawyers representing the client.

In re Bieter Co., 16 F.3d at 935 (quoting Supreme Court Standard 503(b)).

Whether there exists an attorney-client relationship in a given situation is based in large part upon the understanding of the client. "The professional relationship for purposes of the privilege hinges upon the belief that one is consulting a lawyer and his intention to seek legal advice." *Wylie v. Marley Co.*, 891 F.2d 1463, 1471 (10th Cir. 1989). *See also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). The attorney-client privilege thus attaches to confidential communications made to an individual in the mistaken, but reasonable, belief that the individual being consulted is his attorney. *United States v. Mullen & Co.*, 776 F. Supp. 620, 621 (D. Mass. 1991). *See also United States v. Rivera*, 837 F. Supp. 565, 567 n.1 (S.D.N.Y. 1993); *United States v. Tyler*, 745 F. Supp. 423, 425-26 (W.D. Mich. 1990); *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981). The burden of establishing that the information sought falls within the attorney-client privilege rests on the person claiming the privilege. *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 666 (8th Cir. 1986).

The Independent Counsel essentially argues that the White House's and Mrs. Clinton's assertion of attorney-client privilege, and thus any expectation of confidentiality in Mrs. Clinton's communications with lawyers from the White House Counsel's Office, is not well-founded for the following reasons: (1) Mrs. Clinton is not an officer or employee of the White House or Executive Branch and therefore does not have an attorney-client relationship with attorneys in the White House Counsel's office; (2) no court has ever held that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena; (3) the White House was on specific notice that the Independent Counsel did not

believe such a privilege could be maintained against a federal grand jury subpoena; and (4) the conclusion in *United States v. Nixon*, 418 U.S. 683 (1974), demonstrates that a federal government entity may not assert a common-law attorney-client privilege in response to a federal grand jury. The Court will address these claims in turn.

1.

The Independent Counsel argues that because Mrs. Clinton is not elected, appointed, hired, or paid, she is not an officer or employee of the White House or Executive Branch and therefore does not have any conceivable attorney-client relationship with attorneys in the White House Counsel's Office. He argues that only when the First Lady is appointed to or assigned specified duties would it be plausible for the courts to recognize a governmental attorney-client privilege applicable to communications between her and White House attorneys, and as that situation does not exist in this case, the assertion of a governmental attorney-client privilege should be rejected. The Court disagrees.

Mrs. Clinton, like other First Ladies before her, has a widely recognized role as an advisor to the President and is generally considered to be a member of the President's inner circle. See *Judicial Watch, Inc. v. Clinton,* 880 F. Supp. 1, 4 (D.D.C. 1995) ("Mrs. Clinton advises the President on official and other matters"), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996). In this respect, the District of Columbia Circuit addressed the officer or employee status of the First Lady in *Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and concluded, based on 3 U.S.C. § 105(e), that the First Lady is a de facto officer or employee of the White House:

> *Congress* itself *has* recognized that the President's spouse acts as the functional equivalent of an assistant to the

President. The legislative authorization to the President to pay his White House aids includes the following provision:

> Assistance and services authorized pursuant to this section to the President are authorized to be provided to *the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities.* If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

Id. at 904 (emphasis in original) (quoting 3 U. S.C. § 105(e)). The court noted that "section 105 (e) neither limits the particular kind of 'assistance' rendered to the President, nor circumscribes the types of presidential duties and responsibilities to be aided," and that it is thus reasonable "to construe section 105(e) as treating the presidential spouse as a de facto officer or employee." *Id.*

Although the status of the First Lady in *Association of American Physicians and Surgeons* was decided in the context of the Federal Advisory Committee Act, the reasoning of that case nevertheless applies to the situation before this court. Congress, as previously noted, has recognized in section 105(e) that the President's spouse acts as the functional equivalent of an assistant to the President, and section 105(e) neither limits the type of assistance to be rendered to the President nor the circumstances under which such assistance may be rendered. *See id.* 997 F.2d at 904. Accordingly, the Court finds that Mrs. Clinton was a de facto officer or employee of the White House for purposes of this case and that she enjoyed an attorney-client relationship with the lawyers from the White House Counsel's

Office in their representation of the official governmental interests of the White House and the Presidency.[5]

2.

The Independent Counsel argues that even if Mrs. Clinton may be considered an officer or employee of the White House, no court has ever held that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena. He further argues that the White House was on specific notice that the Independent Counsel did not believe it could maintain such a privilege against a federal grand jury subpoena and that any expectation of confidentiality was thus unreasonable.

It is true that there does not appear to be any authority specifically holding that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena.[6] By the same token, however, there apparently is no

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[5] The Independent Counsel acknowledges that communications between Mrs. Clinton and her personal counsel, Mr. Kendall and Ms. Seligman, are protected by the attorney-client privilege. Because the Court concludes that Mrs. Clinton enjoyed an attorney-client relationship with lawyers from the White House Counsel's Office, there is no need to discuss the common-interest or joint defense rule.

[6] The White House cites a state court case from New Jersey, *In re Grand Jury Subpoenas*, 574A.2d 449 (N.J. Super. A.D. 1989), and a Sixth Circuit case, *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989), both of which applied the governmental attorney-client privilege to the criminal process. The Court does not find these cases to be particularly relevant. The New Jersey case was decided in the context of a state grand jury and without extended discussion. There are quite

authority specifically holding that a federal governmental attorney-client privilege *may not* be asserted in such a situation. Although the White House (but not, apparently, personal counsel) may have been put on specific notice that the Independent Counsel did not agree that communications between a witness and the White House Counsel's Office were privileged from disclosure to a federal grand jury, the White House took a different view. Such a dispute regarding the governing law does not render unreasonable the reliance on the attorney-client privilege in this case. In this respect, the White House's and Mrs. Clinton's position on this issue, while it may ultimately turn out to be erroneous, cannot be characterized as being without any foundation. Even prior to the meetings at issue here, the White House Counsel's office has generally considered confidential communications by its lawyers for the purpose of legal advice to be shielded by the attorney-client privilege, see Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 Law and Contemporary Problems 63, 64 (1993) (the White House Counsel's office "regards all of its communications with the president as shielded by attorney-client privilege"), and it is generally accepted that the attorney-client privilege applies in

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different considerations involved with respect to federal government entities before a federal grand jury, and such issues were not addressed in that case. In the Sixth Circuit case, the Independent Counsel correctly notes that the governmental attorney-client issue was not even raised or discussed and that this case is not precedent for an issue neither presented nor decided. *See Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (stare decisis does not apply to an issue never squarely addressed but at most assumed in previous decisions). Moreover, the government entities in the Sixth Circuit case were the City of Detroit and the Detroit City Council. Again, different considerations are involved with respect to federal government entities.

the governmental context in civil cases, *see, e.g., Jupiter Painting Contracting Co. v. United States,* 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("[c]ourts generally have accepted that attorney-client privilege applies in the governmental context"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (noting that it is clear a government agency can be a "client" and agency lawyers can function as "attorneys" within the relationship contemplated by the attorney-client privilege); *Department of Economic Development v. Arthur Anderson & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (same). Thus, the fact that a federal government entity would invoke the attorney-client privilege is by no means novel.

Moreover, it is not always clear whether personal counsel or White House Counsel's office attorneys representing the Office of the President should undertake various legal assignments. Several of the matters under investigation, while originating prior to the date of President Clinton's inauguration (January 20, 1993), involved events that occurred after that date, an example being the discovery of the Rose Law Firm billing records in the White House residence. Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers.[7] That

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[7] The Court recognizes that there are no specific guidelines setting forth the duties of the White House Counsel and that such duties have, for various reasons, changed from one administration to the next. *See* Rabkin, *supra*, at 68-69. Nevertheless, no one argues that the duties of the White House Counsel entail providing legal services to the President or First Lady with respect to matters of a purely personal nature. (As noted by the Independent Counsel, the White House has not suggested that the President or First Lady utilized White House lawyers in this case for personal legal services that would warrant a personal attorney-client privilege.) While it may be appropriate for the White House Counsel's Office to represent

being the case, and considering that the meetings at issue here took place in the midst of several investigations and legal proceedings of an adversarial nature,[8] it cannot be said that Mrs. Clinton was unreasonable in seeking the advice of counsel in both her personal and official capacity. *See also Rabkin, supra,* at 74 (noting that the advice of the White House Counsel has taken on much greater importance with the specter of the independent counsel). Indeed, the Independent Counsel implicitly acknowledged the dual nature of Mrs. Clinton's legal identity when both personal and White House lawyers were present at each of her three interviews conducted at the White House by the Independent Counsel. The Independent Counsel did not object to the presence of White House lawyers at these interviews and, in fact, negotiated the terms of the interviews with both sets of counsel. Although the meetings at issue were not specifically conducted at the behest of the Independent

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the Office of the President with respect to Whitewater matters that specifically affect that Office, it appears that Deputy White House Counsel Vincent Foster was handling matters that concerned events occurring prior to Inauguration and beyond the purview of the White House Counsel's Office. Shortly after Mr. Foster's death, documents relating to these matters were transferred from Mr. Foster's office to the third floor of the residence of the White House and then taken to the Clintons' private attorneys, apparently in recognition that personal counsel should have been handling these matters in the first place. The issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility.

[8] The independent Counsel candidly states in his motion to compel that Mrs. Clinton's testimony on several issues under investigation "has changed over time or differs from that of other witnesses" and trial she "is a central figure" in his investigation.

Counsel, there is no dispute that Mrs. Clinton, her personal counsel, and the White House lawyers all considered these meetings to involve confidential attorney-client communications in her personal and official capacities. The uncertainty of the law in this area does not render unreasonable this expectation of confidentiality.

The case of *United States v. Tyler*, 745 F. Supp. 423, cited previously, is particularly interesting and illustrates the types of circumstances under which an expectation of confidentiality may be considered reasonable. In that case, James E. Tyler was incarcerated in a federal prison with an individual named Melvin P. Deutsch. Tyler testified that he believed Deutsch was an attorney because Deutsch had several diplomas, including a law school diploma, on the wall of his cell and he, along with other inmates, addressed Deutsch as "counselor." *Id.* at 424. Believing him to be an attorney, Tyler paid Deutsch $50.00 to represent him on a matter involving the parole board and made confidential communications to Deutsch seeking legal advice and opinions. *Id.* at 424, 426. It turned out, however, that Deutsch had apparently never attended law school or been licensed to practice law and, further, was assisting the government. *Id.* at 424. The court nevertheless concluded that because Deutsch held himself out to be an attorney to Tyler and others, and because Tyler's belief in this regard was reasonable, the confidential communications to Deutsch were protected by the attorney-client privilege. *Id.* at 426.

As the *Tyler* case demonstrates, the attorney-client privilege will apply to confidential communications between an individual and a person he or she reasonably believes to be his or her attorney, even if that belief later turns out to be mistaken. The Court would only note that the reasonableness of the White House's and Mrs. Clinton's expectations of confidentiality in this case, based as it was on communications with licensed attorneys and in the midst of adverse legal proceedings, is

clearly on stronger footing than was the reasonableness of Tyler's belief.[9]

3.

The Independent Counsel argues that the conclusion in *United States v. Nixon*, 418 U.S. 683, regarding the outer limits of the common-law privilege for Presidential communications demonstrates that there can be no broader common-law governmental attorney-client privilege applicable in federal criminal proceedings. He argues that because *Nixon* held that the most sensitive, most delicate, and most privileged documents in the Executive Branch (other than state secrets) must be produced in federal criminal proceedings, it follows logically that no other Executive Branch documents should receive greater protection as a matter of federal common law.

The Court does not find *Nixon* to be dispositive of the issues in this case. In *Nixon,* the district court issued a trial subpoena for tape recordings of conversations among President

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[9] Referring to the *Tyler* case, Mr. Kendall stated at the October 28 hearing that "[i]f Perry Mason had written this case, it would be called the case of the counterfeit counsel, but alas for Mr. James Elliot Tyler, it was a real case." Tr. 109. The "counterfeit counsel" to whom Mr. Kendall referred, Melvin P. Deutsch, is now incarcerated in a federal prison in Texas and continues to this day to purport to engage in the practice of law. Indeed, Mr. Deutsch recently submitted to this Court in the contempt proceedings involving Susan H. McDougal, on her behalf, a "Notice of Motion, "Friend of the Court Application," and "Petition for a Writ of Habeas Corpus." The Court notified Mr. Deutsch by letter dated October 21, 1996, that these materials would not be considered since, among other things, Ms. McDougal is already represented by counsel.

Nixon and various aides and advisers, including White House Counsel John W. Dean. The President resisted the subpoena, claiming a general privilege against disclosure of confidential communications. In rejecting the President's claim, the Supreme Court balanced the President's "generalized privilege of confidentiality" against "the constitutional need for relevant evidence in criminal trials" and held as follows:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. 418 U.S. at 712-13.

Nixon is distinguishable for several reasons. Unlike the situation before this Court, there was no claim of attorney-client privilege made by the President in *Nixon*, and the Court thus did not address whether such a privilege could be sustained. Even had such a privilege been asserted, the result would most likely have been the same since the lawyer with whom the President engaged in confidential communications, White House Counsel John Dean, admitted that he was communicating with the President for the purpose of participating in a conspiracy to commit federal crimes.[10] It is

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[10] Under the crime-fraud exception, attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal or fraudulent scheme. *In re Berkley & Co., Inc.*, 629 F.2d 548, 553 (8th Cir. 1990). The Independent Counsel has not alleged that Mrs. Clinton was consulting White House lawyers for such a purpose and this Court therefore did not conduct an *in camera*

thus doubtful that a claim of attorney-client privilege would have afforded President Nixon any protection from ultimate production of the tapes. In addition, the materials subpoenaed in Nixon consisted of taped conversations whereas the materials in this case consist of attorney work product in the form of attorneys' notes written during meetings of the client and her attorneys. Different considerations are attendant to an assertion of the work product protection, considerations which were not addressed in *Nixon.* The Supreme Court's opinion in *Nixon*, then, while perhaps relevant to a discussion of whether the governmental attorney-client privilege and work product doctrine may as a general matter be asserted in response to a federal grand jury subpoena, cannot be read as conclusively rejecting the White House's and Mrs. Clinton's claims in the matter before the Court. These issues were not raised or discussed in *Nixon,* and the case is not precedent for issues neither presented nor decided. See note 6, *supra.*[11]

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examination of the subpoenaed material at the October 28 hearing.

[11] The Independent Counsel also cites 28 U.S.C. § 535(b) in support of his argument, stating that this statute compliments *Nixon* and is evidence that there cannot be a "governmental attorney-client privilege in federal grand jury proceedings. Section 535(b) provides that "(any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 [18 USCS §§ 1 *et seq.*] involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . ." As was the case in *Nixon,* this provision says nothing of the attorney-client privilege or work product doctrine and cannot be read as conclusively rejecting the White House's and Mrs. Clinton's claims in the matter before the Court.

4.

In sum, the meetings with Mrs. Clinton occurred at a time when several congressional investigations were in progress, when two grand juries had been impaneled, and when Mrs. Clinton was (and apparently still is) a "central figure" in the investigation of the Independent Counsel. The law governing application of the attorney-client privilege in this area, as acknowledged by the Independent Counsel, is uncertain, and Mrs. Clinton, as the functional equivalent of an officer or employee of the White House, considered her communications with lawyers from the White House Counsel's Office and personal counsel, as did those lawyers, to be confidential and for the purpose of receiving legal advice. Under these circumstances, the Court concludes that the White House's and Mrs. Clinton's belief in this regard was genuine and reasonable (whether or not mistaken) and that the Nemetz and Sherburne notes are therefore protected from disclosure to the grand jury by the attorney-client privilege.

B. *Work Product Doctrine*

The White House and Mrs. Clinton additionally assert that the Nemetz and Sherburne notes are protected from disclosure to the grand jury by the work product doctrine. The Independent Counsel argues, however, that the work product doctrine does not apply in this situation for the same reasons he claims the attorney-client privilege does not apply. He additionally argues that the notes were not prepared in anticipation of litigation, a requirement of the work product doctrine, and therefore the doctrine is not applicable. The Court disagrees on both points.

The work product doctrine was designed to prevent unwarranted inquiries into the files and mental impressions of an attorney and recognizes that it is essential that a lawyer work with a certain degree of privacy. *Hickman v. Taylor,* 329 U.S.

495, 510-11 (1947). *See also In re Chrysler Motors Corp. Overnight Evaluation Program,* 860 F.2d 844, 846 (8th Cir. 1988) (citation omitted). The work product doctrine is distinct from and broader than the attorney-client privilege. *In* re *Grand Jury Subpoenas Duces Tecum,* 773 F. 2d 204, 206 (8th Cir. 1985). The test for whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation. *In re Grand Jury Proceedings,* 473 F.2d 840, 847 (8th Cir. 1973).

The Nemetz and Sherburne notes are attorney work product based on the meetings with Mrs. Clinton. To the extent these notes reveal communications, they are protected by the attorney-client privilege for the reasons previously stated. *See Upjohn,* 449 U.S. at 401. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. *Id.*[12] The Nemetz and Sherburne notes are thus work product of the type that is clearly protected from disclosure to the grand jury. *See In re Grand Jury Proceedings,* 473 F.2d at 847 (holding attorney's witness notes absolutely protected from disclosure in grand jury setting and noting that to require the attorney "to state what he remembers or what he saw fit to write down as to the remarks of a witness would carry additional dangers not involved when the lawyer is merely asked to turn over a statement that the witness has signed") (quoting C. Wright, *Law of Federal Courts,* 362 (2d ed. 1970)).

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[12] Mr. Kendall states that both sets of notes, in addition to reflecting the substance of communications at the meeting between a client and her attorneys, also reflect the thoughts, impressions, and strategies of all the lawyers present. As previously noted, the Independent Counsel does not dispute the assertions regarding the circumstances of the two meetings, and this Court has not reviewed the notes *in camera,* there having been no claim that these communications fall within the crime-fraud exception.

While litigation night not have been immediately imminent when the meetings took place, there nevertheless were numerous adverse legal proceedings in progress, including two grand jury investigations. Such legal proceedings satisfy the "in anticipation of litigation" requirement of the work product doctrine. *See, e.g., In re Grand Jury Proceedings,* 473 F.2d 840 (applying work product doctrine to grand jury proceedings); *In re Sealed Case,* 29 F.3d 715, 718 (D.C. Cir. 1994) (noting that the "in anticipation of litigation" requirement of the work product doctrine is satisfied where attorney "had an eye toward litigation"); *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 7 (D.D.C. 1995) (same). Because the White House and Mrs. Clinton genuinely and reasonably considered her communications with lawyers from the White House Counsel's Office and personal counsel to be confidential and for the purpose of receiving legal advice, and because the Nemetz and Sherburne notes were taken in anticipation of litigation, these notes are protected from disclosure to the grand jury under the work product doctrine.

III. *Conclusion*

Both the White House and the Independent Counsel would prefer that this Court resolve the issue of whether a federal government entity may assert the attorney-client privilege and work product doctrine in response to a federal grand jury subpoena. The general practice of this Court, however, is to decide issues on narrow grounds and not to resolve difficult and complex issues unnecessarily. With this principle in mind, the Court concludes that these notes are protected from disclosure by the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product.

IT IS THEREFORE ORDERED that the Independent Counsel's motion to compel production of the Nemetz and

Sherburne notes called for by grand jury subpoena duces tecum #2006 to the White House be and it hereby is denied.

Dated this 26th day of November 1996.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE:	GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	No. GJ-96-3 (UNDER SEAL)

DECLARATION OF JANE C. SHERBURNE

I, Jane C. Sherburne, declare as follows:

1. I am an active member of the Bar of the District of Columbia.

2. I have been employed by the White House as Special Counsel to the President since January 3, 1995.

3. I am familiar with and consider my ethical obligations to be governed by the District of Columbia Rules of Professional Conduct.

4. My duties as Special Counsel to the President include the representation of the Office of the President with regard to the investigation by Independent Counsel Kenneth Starr (the "IC") and the congressional investigations of allegations related to what has come to be known as "Whitewater."

5. The IC has investigated a number of matters involving conduct by White House officials, including the handling by White House officials of documents in the office of Deputy Counsel Vincent Foster following his death (the

"Foster document handling" matter) and the discovery in the White House Residence and subsequent production of Rose Law Firm billing records by White House officials (the "Rose Law Firm billing records" matter).

6. These matters also have been investigated by congressional committees, contemporaneously with the IC's investigation. Specifically, the Special Committee to Investigate Whitewater and Related Matters (the "Senate Whitewater Committee"), has investigated the Foster document handling and Rose Law Firm billing records matters. The House Committee on Government Reform and Oversight (the "Government Reform Committee") has had an investigative interest in the Foster document handling matter. The House Committee on Banking and Financial Services (the "House Banking Committee") has had an investigative interest in both matters.

7. In connection with these and other matters under investigation by the IC, Counsels to the President and I, as well as several lawyers in the White House Counsel's Office working under my direction, have provided a variety of legal advice and services to the Office of the President.

a. I have advised and assisted the Office of the President by managing its response to document requests and subpoenas. These services have included interpreting requests, negotiating with both the IC and congressional committees regarding the scope of requests, determining what document collection methods are sufficient, and overseeing the actual production of documents to the requesters. In addition, I have advised the Office of the President regarding how the information in the documents and our response to these requests should be explained to the public.

b. I have advised and assisted the Office of the President in determining whether any privileges or other confidentiality interests should be asserted with regard to any of the information requested. I have negotiated with the IC and

congressional committees to accommodate interests in privileged material. I have advised the Office of the President regarding how any assertions of privilege should be explained to the public.

c. I have advised the Office of the President on matters related to appearances by White House officials before congressional investigating committees. I have negotiated the terms of such appearances with such committees and advised witnesses, primarily through their privately retained counsel, about the application of privileges to possible areas of questioning.

d. I have represented the interests of the Office of the President in seeking to ensure that the conduct of White House officials is portrayed accurately and without distortion at public hearings conducted by congressional investigating committees.

e. I have assisted and advised the Office of the President in determining whether any matters under investigation involve conduct by White House officials that should be addressed by the Office of the President.

f. I have assisted and advised the Office of the President regarding the issuance of public statements relating to the matters under investigation.

h. Without objection from the IC, Counsels to the President and I have represented the Office of the President at interviews by the IC of the President and the First Lady. We also have represented the interests of the Office of the President in discussions with the IC regarding such interviews and in the preparation of the President and the First Lady for these interviews.

8. The legal advice and assistance described above has been necessary, not only to satisfy legal obligations of the Office of the President with regard to the ongoing investigations, but also to preserve public confidence in the

Presidency, avoid new allegations of impropriety related to our response to the investigations, and permit the Office of the President to fulfill effectively, with a minimum of distraction, its function to further the policies and initiatives of the President.

9. To perform effectively the legal services described above, it is essential for lawyers representing the Office of the President to learn and understand the facts underlying each investigation. This process has involved, among other things, frequent consultation with private counsel for White House officials, including private counsel for the President and the First Lady. (In many instances, White House officials also have retained private counsel to represent them in inquiries related to the performance of their official duties.)

10. Because of the prominence of their official roles, the President and the First Lady require representation in both their private and their official capacities in connection with almost every aspect of the various Whitewater inquiries. The Office of the President shares a common interest with the President and First Lady in many respects. Consultation between the private attorneys for the President and the First Lady and attorneys for the Office of the President is necessary to permit the proper allocation of responsibility among counsel, appropriate responses to document requests, the sharing of facts relevant to both representations, and the discussion of potential advice.

11. The IC seeks to compel production of two sets of notes taken by lawyers for the Office of the President in the course of performing their duties. The first set of notes was taken by Miriam Nemetz, Associate Counsel to the President, on July 11, 1995 (the "Nemetz notes"). The second set of notes was taken by me on January 26, 1996 (the "Sherburne notes"). I will describe below the circumstances surrounding the creation of each set of notes.

12. At the time of the creation of each set of notes, there were in progress active investigations of Whitewater-related matters by the IC, the Senate Whitewater Committee, the House Banking Committee, the Government Reform Committee, the FDIC, and the RTC. During this period, many White House officials had given or were about to give testimony to congressional committees and to the grand jury empaneled by the IC in Washington, D.C. The congressional committees and the IC also had directed document subpoenas or requests to the White House.

13. On June 12, 1994, Special Counsel Fiske questioned the President and Mrs. Clinton about their knowledge of the Foster document handling matter in depositions in the White House Residence. After Mr. Fiske was replaced, the new IC Kenneth Starr indicated an interest in posing additional questions to the President and the First Lady related to this matter. By letter dated July 6, 1995, the IC indicated that this matter would be among the subjects covered in the scheduled July 22, 1995 depositions.

14. Further, in early July 1995, I and lawyers working under my direction, including Ms. Nemetz, were preparing for hearings before the Senate Whitewater Committee regarding the Foster document handling matter, scheduled to begin on July 18, 1995. This work involved the gathering and analysis of facts related to the events under investigation as well as the collection, review, and production of documents responsive to requests from the Senate Whitewater Committee.

15. The Office of the President determined, prior to the start of the hearings, that in order to facilitate public understanding of the events being investigated it was necessary to present accurately the relevant facts to the public. Before proceeding, however, we needed to complete our understanding of Mrs. Clinton's knowledge of the matter. I therefore asked to meet with her to discuss her activities during the period immediately following Mr. Foster's suicide.

16. I met with Mrs. Clinton on July 11, 1995. The other people present at the meeting were David Kendall, a partner at the law firm of Williams & Connolly, who represents the President and Mrs. Clinton in their personal capacities, and Ms. Nemetz. Ms. Nemetz took notes during the meeting. As planned, the subject of the meeting was Mrs. Clinton's activities in the period immediately following Foster's death. I understood the meeting was a confidential attorney-client communication.

17. The discussion with Mrs. Clinton facilitated the representation of the Office of the President in several ways. First, the interview formed the basis for subsequent advice to the Office of the President, including Mrs. Clinton as one of its constituents, regarding the scheduled IC depositions. Second, the information obtained in the interview, and any insights from the discussion, assisted the Office of the President in providing informed and accurate information to the public about the Foster matter. And, third, the interview was necessary to enable me to advise the Office of the President how appropriately to respond to allegations leveled against the First Lady in the ensuing public hearings before the Senate Whitewater Committee.

18. On January 4, 1996, I learned that Ms. Carolyn Huber, a White House employee, had located in the White House Residence a copy of billing records relating to work performed by attorneys at the Rose Law Firm, including Mrs. Clinton, for Madison Guaranty. In consultation with Mrs. Clinton's private counsel, the billing records were turned over promptly to the IC, the Senate Whitewater Committee, the House Banking Committee, the FDIC and the RTC. The IC and the Senate Whitewater Committee immediately launched investigations related to the finding of the billing records. The regulatory agencies also undertook to scrutinize the billing records.

19. On January 19, 1996, the IC issued a subpoena for Mrs. Clinton to testify before the grand jury in Washington, D.C., regarding the discovery of the billing records. I participated in negotiations with the IC regarding the subpoena to Mrs. Clinton.

20. On January 26, 1996, Mrs. Clinton testified before the grand jury. During breaks in the proceeding, and following its conclusion, Mrs. Clinton met jointly with her private lawyers and with lawyers for the Office of the President to discuss her testimony before the grand jury. Mr. Kendall, his partner Nicole Seligman, and I participated in these conversations. Counsel to the President John M. Quinn was present at the discussions during the breaks. I took notes during these conversations with Mrs. Clinton. I understood these conversations to be confidential attorney-client communications.

21. The debriefing of Mrs. Clinton regarding her grand jury testimony facilitated the representation of the Office of the President in several ways. Participation in the debriefing permitted lawyers for the Office of the President to protect the interests of the office with regard to Mrs. Clinton's testimony. It also facilitated advice to Mrs. Clinton regarding how to address the grand jury appearance and the billing records matter in her role as First Lady of the United States. The information provided by Mrs. Clinton in the debriefing also facilitated advice to the Office of the President regarding responses to congressional inquiries and future requests from the IC regarding the matter, and to ensure the accuracy of public statements by the White House about the billing records and the grand jury appearance.

22. The confidentiality of both the Nemetz notes and the Sherburne notes has been carefully maintained. The notes have been disclosed only to lawyers representing the Office of the President with a need to see them and to private counsel for Mrs. Clinton.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 30, 1996.

/s/
Jane C. Sherburne

FILED UNDER SEAL -- GRAND JURY MATERIALS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	)	No. GJ-96-3 (UNDER SEAL)

City of Washington)
) ss:
District of Columbia)

AFFIDAVIT OF DAVID E. KENDALL

David E. Kendall, being duly sworn, deposes and says:

(1) I am a practicing attorney, a partner at the Washington, D.C., law firm of Williams & Connolly, and an active member of the District of Columbia Bar.

(2) Since 1993, my law firm and I have continuously represented the President and Mrs. Clinton ("the clients") as personal counsel with respect to "Whitewater" matters. This has included representing the clients with respect to investigations conducted by the Department of Justice, Independent Counsel Robert Fisk, Independent Counsel Kenneth Starr, the Resolution Trust Corporation ("RTC"), the Federal Deposit Insurance Corporation ("FDIC"), the Inspector General's Office of the FDIC, and various Committees of the House and Senate.

(3) My clients have a common interest with the Office of the President in, inter alia: (a) becoming fully informed as to all relevant facts so as to provide accurate information on "Whitewater" matters to the Independent Counsel ("IC"), the RTC, the FDIC, Congressional Committees, private litigants, and the public; (b) responding appropriately to document requests from various entities; (c) defending against false or meritless allegations and charges; (d) obtaining requisite legal services efficiently and economically, with the least possible imposition; and (e) protecting and exercising as appropriate all legal rights, privileges and remedies, based upon the fully informed advice of counsel. Because it is not always self-evident whether personal counsel or White House Counsel's Office attorneys representing the office of the President should undertake various legal assignments, it is necessary for the two sets of counsel to be able to confer confidentially and to coordinate their efforts in order to assure that all legal duties are performed and all common interests are protected in a timely, thorough, and responsible manner.

(4) The clients have fully cooperated with the IC's investigation. In response to numerous document requests, they have produced more than 75,000 documents. They have responded to written interrogatories. Personal counsel have supplied information to the IC informally on numerous occasions. The clients have given testimony under oath at the White House, pursuant to the IC's request, on three different occasions: June 12, 1994; April 22, 1995; and July 22, 1995. Moreover, Mrs. Clinton testified before a federal grand jury in Washington, D.C., on January 26, 1996, and was examined by counsel for the IC. In 1994, the clients produced thousands of documents to the RTC, and they submitted lengthy interrogatory responses to the RTC in May, 1995. Mrs. Clinton also responded to supplemental interrogatories in January, 1996, and gave oral testimony to the RTC in February, 1996. The RTC elected ultimately to take no enforcement action. An investigation by the Inspector General of the FDIC is

apparently still pending. In addition, beginning in 1994, the FDIC was conducting a civil investigation of Mrs. Clinton's legal work at the Rose Law Firm. Mrs. Clinton had produced documents, answered FDIC interrogatories, and, in November, 1994, was examined orally by FDIC investigators. The clients have also responded to various requests for information, including producing documents, answering interrogatories, and providing information informally, from Congressional Committees on "Whitewater" matters.

(5) On July 11, 1995, I had a confidential meeting with Mrs. Clinton in the Residence at the White House for the purpose of giving legal advice. Late in this meeting, two attorneys from the White House counsel's Office (Jane C. Sherburne and Miriam R. Nemetz) joined Mrs. Clinton and me, to continue the meeting, for the same purpose. The first of the two documents the IC now seeks to obtain is the set of notes that Ms. Nemetz took during the time she was in attendance.

(6) On January 26, 1996, Mrs. Clinton testified pursuant to subpoena before a federal grand jury in Washington, D.C. During breaks in her testimony and at the conclusion of her testimony, Mrs. Clinton was confidentially counseled and "debriefed" by her attorneys. The sessions with Mrs. Clinton which occurred in a private room at the federal courthouse during breaks in her testimony were attended by me, my partner Nicole K. Seligman, White House Counsel John M. Quinn, and Ms. Sherburne. The session with Mrs. Clinton which occurred at the White House Residence at the conclusion of her testimony was attended by Ms. Sherburne, Ms. Seligman, and me. The second of the two documents the IC now seeks to obtain is the set of notes Ms. Sherburne took during these sessions with Mrs. Clinton.

(7) On both July 11, 1995, and January 26, 1996, a great deal of litigation and a great many adversarial proceedings were in progress or threatened, including the Independent Counsel's investigation (which had resulted in a number of guilty pleas

and one pending indictment on July 11, 1995, and two pending indictments on January 26, 1996), the RTC's civil investigation, and Senator D'Amato's investigation (on the relevant dates, he chaired the Special Committee to Investigate Whitewater Development Corporation and Related Matters).

(8) As members of the District of Columbia Bar, Ms. Seligman and I are governed by the Rules of Professional Conduct promulgated in a 1990 order of the District of Columbia Court of Appeals. Rule 1.6(a) provides that a lawyer may not knowingly reveal information protected by the attorney-client privilege or certain other information gained in the professional relationship, in the absence of waiver or an explicit exception. I believe, and believed at the time of the meetings, that Rule 1.6(a) is also applicable to the conduct of Mr. Quinn, Ms. Sherburne, and Ms. Nemetz who are, to my knowledge, also members of the District of Columbia Bar.

(9) In my professional opinion, it would be impossible for Ms. Seligman and me to advise our clients effectively and efficiently on matters of common interest with the Office of the President unless we could enjoy a confidential professional relationship with attorneys from the White House Counsel's office, which represents our clients in their official capacity. I reasonably believed that such a relationship in fact existed on July 11, 1995, and Ms. Seligman and I reasonably believed that such a relationship in fact existed on January 26, 1996.

/s/
DAVID E. KENDALL

Subscribed and sworn to before me
this 30th day of September

/s/
Notary Public

Rule 501. General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim of defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.